* Together with Cayuga Rock Salt Co. et al v. New Jersey et al

No. 1346

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 19 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967.

No. 1345.

INTERNATIONAL SALT COMPANY,
Petitioner,

v.

THE STATE OF NEW JERSEY, on Behalf of Itself and All Others Similarly Situated, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

LEWIS H. VAN DUSEN, JR.,
DRINKER BIDDLE & REATH,
1100 Philadelphia National Bank Bldg.,
Philadelphia, Pa. 19107
Counsel for Petitioner,
International Salt Company.

HOWARD F. ORDMAN,
MORRIS R. BROOKE,
Of Counsel.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

INDEX.

	Page
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	16

TABLE OF CASES CITED.

	Page
Alex Theatre Corp. v. Balaban & Katz Corp., 1952 Trade Cases, para. 67,357 (N. D. Ill. 1952)	8
Barnett v. Warner Bros. Pictures Distrib. Corp., 112 F. Supp. 5 (N. D. Ill. 1953)	8
Charles Rubenstein, Inc. v. Columbia Pictures Corp., 154 F. Supp. 216 (D. Minn. 1957)	11
Charles Rubenstein, Inc. v. Columbia Pictures Corp., 176 F. Supp. 527 (D. Minn. 1959), aff'd, 289 F. 2d 418 (8 Cir. 1961)	11
Chattanooga Foundry and Pipe Works v. Atlanta, 203 U. S. 390 (1906)	11
Christensen v. Paramount Pictures, Inc., 95 F. Supp. 446 (D. Utah 1950)	12
Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F. 2d 412 (7 Cir. 1963), cert. denied, 376 U. S. 939 (1964)	13
Court Degraw Theatre, Inc. v. Loew's Inc., 192 F. Supp. 198 (E. D. N. Y. 1959)	11
Douglass v. County of Pike, 101 U. S. 677 (1879)	15
Electric Theatre Co. v. Twentieth Century-Fox Film Corp., 113 F. Supp. 937 (S. D. Mo. 1953)	8
Gelpecke v. City of Dubuque, 68 U. S. (1 Wall.) 175 (1863)	14
Gordon v. Lowe's, Inc., 147 F. Supp. 398 (D. N. J. 1956)	8
Grengs v. Twentieth Century Fox Film Corp., 232 F. 2d 325 (7 Cir.), cert. denied, 352 U. S. 871 (1956)	8
Hanover Shoe, Inc. v. United Shoe Machinery Corp., 377 F. 2d 776 (3 Cir. 1967), cert. granted, 88 S. Ct. 86 (1967)	15
Hardy Salt Company v. State of Illinois et al., (8 Cir. 1967) cert. denied (1967)	12
International Shoe Machinery Corp. v. United Shoe Machinery Corp., 315 F. 2d 449 (1 Cir. 1962), cert. denied, 375 U. S. 820 (1963)	10

TABLE OF CASES CITED (Continued).

Page

Leh v. General Petroleum Corp., 382 U. S. 54 (1965) 6, 8, 9, 10, 11, 12, 13, 14

Leonia Amusement Corp. v. Loew's, Inc., 117 F. Supp. 747 (S. D. N. Y. 1953) 8, 11

Levy v. Paramount Pictures, Inc., 104 F. Supp. 787 (N. D. Cal. 1952) 11, 12

Lyons v. Westinghouse Electric Corp., 235 F. Supp. 526 (S. D. N. Y. 1964) 15

Manny v. Warner Bros. Pictures, Inc., 116 F. Supp. 807 (S. D. Cal. 1953) 8

Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co., 216 F. Supp. 507 (D. N. J. 1965) 9

Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U. S. 311 (1965) 6, 14

Momand v. Universal Film Exchanges, Inc., 172 F. 2d 37 (1 Cir. 1948), cert. denied, 336 U. S. 967 (1949) 11

Morton Salt Company v. United States, 382 U. S. 44 (1965) .. 5

Ohio Theater Corp. v. Loew's, Inc., 156 F. Supp. 770 (D. D. C. 1957) aff'd, 261 F. 2d 380 (D. C. Cir. 1958), cert. denied, 359 U. S. 943 (1959) 10

Samuel Goldwyn Production, Inc. v. Fox West Coast Theatres Corp., 146 F. Supp. 905 (N. D. Cal. 1956) 11

Simpson v. Union Oil Co., 270 F. Supp. 754 (N. D. Cal. 1967) . 15

Simpson v. Union Oil Co., 377 U. S. 13 (1964) 15

Skouras Theatres Corp. v. RKO Corp., 193 F. Supp. 401 (S. D. N. Y. 1961) 8

State of Michigan v. Morton Salt Company, 259 F. Supp. 35 (D. Minn. 1966) aff'd on other grounds, 377 F. 2d 768 (8 Cir. 1968) 5, 9, 10

Sun Theatre Corp. v. RKO Radio Pictures, Inc., 213 F. 284 (7 Cir. 1954) 8

Swift & Co. v. United States, 276 U. S. 311 (1928) 13

Tague v. Balaban, 146 F. Supp. 356 (N. D. Ill. 1956) 8

TABLE OF CASES CITED (Continued).

	Page
Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U. S. 537 (1954)	10
2361 State Corp. v. Sealy, Inc., 263 F. Supp. 845 (N. D. Ill. (1967)	12
Union Carbide & Carbon Corp. v. Nisley, 300 F. 2d 561 (10 Cir. 1961), appeal dismissed sub nom. Wade v. Union Carbide & Carbon Corp., 371 U. S. 801 (1962)	8
United States v. American Society of Composers, 331 F. 2d 117 (2 Cir. 1964), cert. denied, 377 U. S. 997 (9 Cir. 1964)	13
United States v. Morton Salt Company, 1964 CCH Trade Cases ¶ 71,304 (D. Minn. 1964)	5
Wood v. Carpenter, 101 U. S. 131 (1879)	11

MISCELLANEOUS.

	Page
Clayton Act:	
Section 4(b), 15 U. S. C. Section 15(b)	3, 6
Section 5(a), 15 U. S. C. Section 16(a)	9, 10, 12
Section 5(b), 15 U. S. C. Section 16(b)	2, 3, 4, 6, 11, 12
28 U. S. C. Section 1254(1)	2
Atty. Gen. Nat'l Comm. Antitrust Rep. (1955)	13
Letter of Donald F. Turner to Emanuel Celler, Chairman of the Committee on the Judiciary, House of Representatives, printed in Antitrust and Trade Regulation Report No. 297, March 21, 1967, pages X-1 to X-3	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No.

INTERNATIONAL SALT COMPANY,

Petitioner,

v.

THE STATE OF NEW JERSEY, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, International Salt Company, prays that a writ of certiorari be granted to review the decision of the United States Court of Appeals for the Third Circuit rendered in this action on December 8, 1967; petition for rehearing denied, January 22, 1968.[1]

CITATIONS TO OPINIONS BELOW.

The interlocutory order and supporting opinion of the United States District Court for the District of New Jersey, printed in Appendix B hereto, *infra*, p. A-2, is not officially reported. The opinion of the Court of Appeals for the Third Circuit, reversing the decision of the District Court is reported in 387 F. 2d 94. It is printed in Appendix B hereto, *infra*, p. A-38.

1. Additional respondents beside the State of New Jersey are: County of Bergen, a body politic and corporate of the State of New Jersey; New Jersey Highway Authority and New Jersey Turnpike Authority.

JURISDICTION.

The decision of the Court of Appeals for the Third Circuit was entered on December 8, 1967. Rehearing was denied on January 22, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. Under Section 5(b) of the Clayton Act, was the normal four-year period of limitation applicable to the private antitrust claims of the State of New Jersey asserted against petitioner herein, suspended by the pendency of a government civil antitrust action in Minnesota, to which petitioner (having entered a consent decree) was not a party, and in which the matter complained of was limited to alleged antitrust violations affecting a six-state area in the mid-west (not including New Jersey)?

2. Where the law existing in 1963, when petitioner entered a consent decree in the government civil antitrust action, specifically and uniformly provided that the continued pendency of the government action did not suspend the statute of limitations as to petitioner, and accordingly the statute ran on claims against petitioner one year later, in 1964, can a subsequent "change" in the law (based upon decisions of this Court in 1965) be applied retroactively to revive petitioner's liability and permit the instant claims to be maintained?

STATUTE INVOLVED.

The statutory provision involved is section 5(b) of the Clayton Act, 15 U. S. C. Section 16(b). It is printed in Appendix A, *infra*, p. A-1.

STATEMENT OF THE CASE.

On June 28, 1965 the State of New Jersey filed a document purporting to commence this action (R. 1a). This document was never served on any defendant, and there is a dispute between the parties as to whether it validly commenced the action. We shall assume, however, in accordance with respondents' contention, solely for purposes of this petition, that June 28, 1965 does represent the date of commencement of the action.

The action was brought by the State of New Jersey under Section 4 of the Clayton Act, on behalf of itself and all others similarly situated, seeking to recover from International Salt Company, petitioner herein, and others [2] damages for alleged conspiratorial fixing of the prices paid by the State of New Jersey for its purchases of rock salt (R. 21a-27a).[3] Its claims are governed by the statute of limitations found in Sections 4(b) of the Clayton Act, as supplemented by Section 5(b) of that Act, 15 U. S. C. Sections 15(b) and 16(b) (R. 61a).

Section 4(b) of the Clayton Act provides that any cause of action of the type here asserted shall be forever barred unless commenced within four years after the cause of action accrued. The District Court herein found that respondent State of New Jersey had full knowledge of its claims prior to June 28, 1961 and was, in failing to prosecute them, guilty of negligence and laches (R. 176a) (Ap-

2. The other defendants are: Morton Salt Company; Cayuga Rock Salt Company; Diamond Crystal Salt Company; Charles Schaefer Sons, Inc.; Winans Carter Corp.; and Winans Reliance Corp.

3. Certain state and municipal bodies in the State of New Jersey (County of Bergen, New Jersey Highway Authority and New Jersey Turnpike Authority) intervened as plaintiffs in the action and are respondents herein.

pendix B, *infra*, p. A-35). Accordingly, by the normal operation of this four-year statute the State's claims against petitioner accruing prior to June 28, 1961 are barred.[4]

Section 5(b) of the Clayton Act, however, provides that the existence of a government action may suspend the statute of limitations during the period of the pendency of the government action and for one year thereafter, and that a cause of action may be maintained if commenced either within four years of its accrual or within this period of suspension, provided that it is based "in whole or in part on any matter complained of in the government action."

The State of New Jersey relies upon a prior government civil action commenced against petitioner in Minnesota in 1961 and claims that the instant action was commenced within the period of suspension of the statute created by that action.

This prior government civil action was commenced in the United States District Court for the District of Minnesota on July 11, 1961 against petitioner and others alleging conspiratorial fixing of prices for rock salt sold to cer-

---

4. The District Court granted petitioner partial summary judgment on this basis (R. 180a). Regarding the State of New Jersey's awareness of its claims prior to June 28, 1961 the Court said:

> ". . . I am compelled to the conclusion that there has been negligence, laches on the part of the plaintiff, New Jersey, in this case. The claim of collusion, of violation of the antitrust law was open and notorious certainly in 1960. Claims of this nature from reputable people, and statements appeared in various newspapers throughout the eastern seaboard, and it seems to me that New Jersey very clearly on the proofs before me—and I am not determining whether or not there was fraudulent concealment—but on the proofs before me has been negligent, guilty of laches in not proceeding to investigate further and further as to all the publicity,—and this knowledge called for it to do so,—and not proceeding forthwith and filing a suit in this court . . . much sooner." (R. 176a).

tain specified state and municipal bodies in the mid-west.[5] The government's case was specifically limited to sales of rock salt by sealed bid to these purchasers in the six-state area comprised of Minnesota, Wisconsin, Michigan, Illinois, Indiana and Ohio. *United States v. Morton Salt Company,* 1964 CCH Trade Cases ¶ 71,304 (D. Minn. 1964).

On September 30, 1963, before trial of this case (and after petitioner had been acquitted by a jury in a companion criminal case based on the same allegations),[6] petitioner concluded a consent decree with the government and upon the entry of that decree in the record on November 4, 1963 the action against petitioner terminated. Other parties to the action, however, continued to litigate. Ultimately, a final judgment was entered against Morton Salt Company and Diamond Crystal Salt Company on November 24, 1964 concluding that they were guilty of violation of Section 1 of the Sherman Act on sales to the named purchasers in the six-state area set forth above. 1964 CCH Trade Cases ¶ 71,304 (D. Minn. 1964). This decision was affirmed on appeal by this Court on October 25, 1965. *Morton Salt Company v. United States,* 382 U. S. 44 (1965).

It is apparent that, the government civil action upon which the State relies having terminated against petitioner on November 4, 1963 upon the entry of the consent decree, the State's action was not commenced during the pendency of the government proceedings against petitioner or within

5. The named purchasers were: State of Minnesota, City of Minneapolis, City of St. Paul, State of Wisconsin, City of Milwaukee, State of Illinois, Illinois Toll Road, City of Chicago, Chicago Transit Authority, State of Indiana, Indiana Toll Road, State of Michigan, Wayne County, City of Detroit, State of Ohio and Ohio Turnpike. *State of Michigan v. Morton Salt Company,* 259 F. Supp. 35 (D. Minn., 1966) at page 71.

6. The government civil action was a companion suit to a criminal action commenced by the government against the same parties which, after a five-week trial, resulted in a jury verdict of acquittal of all defendants on June 7, 1962.

one year thereafter.[6a] It was, however, commenced during the appeal to this Court of the determination made against Morton Salt Company and Diamond Crystal Salt Company regarding their sales in the mid-west.

Upon these facts the District Court below concluded that the State's action seeking to recover from petitioner for alleged fixing of rock salt prices in New Jersey, was not basd in whole or in part on any matter complained of in the government action as required under section 5(b) and thus strictly applied the four-year statute of limitations (R. 180a) (Appendix B, *infra* p. A-36).

The United States Court of Appeals for the Third Circuit reversed the determination of the District Court holding that the pendency of the government action against Morton Salt Company and Diamond Crystal Salt Company did suspend the statute on the State of New Jersey's instant claims against petitioner.

The Court of Appeals reached this conclusion on the basis of a case decided by this Court on November 8, 1965, namely *Leh v. General Petroleum Corp.*, 382 U. S. 54 (1965).[7] The Court of Appeals acknowledged that the law prior to this decision embodied in a series of cases [8] had for fifteen years clearly and uniformly supported petitioner's position that the continued pendency of the government action against Morton and Diamond did not suspend the statute of limitations as to petitioner. But, said the Court of Appeals,

> "We conclude that . . . the line of cases [relied upon by petitioner] . . . were based upon an interpretation

---

6a. See footnote 10, *infra*.

7. The Court of Appeals also derived support for its determination from this Court's decision in *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U. S. 311 (1965) decided on May 24, 1965.

8. Cited at p. 8, *infra*.

of Section 16 [section 5 of the Clayton Act] which was destroyed by the quoted analysis made by the United States Supreme Court in the *Leh* cases." (Appendix B, *infra* p. A-45)

Despite the fact that under the law as it existed in 1963, at the time petitioner entered the consent decree in the government action, there was no suspension of the statute on the State's claims against petitioner, and hence the statute on these claims ran one year later, in 1964, the Court of Appeals concluded that the "change" in the law in 1965 could and should be applied retroactively to revive petitioner's liability.

On January 22, 1968 rehearing was denied.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals in this case is contrary to the line of decisions holding that the continued pendency of a government action against others does not continue to suspend the statute of limitations as to one who has terminated the government action against him by the entry of a consent decree: *Union Carbide & Carbon Corp. v. Nisley*, 300 F. 2d 561 (10 Cir. 1961), appeal dismissed sub nom. *Wade v. Union Carbide & Carbon Corp.*, 371 U. S. 801 (1962); *Grengs v. Twentieth Century Fox Film Corp.*, 232 F. 2d 325 (7 Cir.), cert. denied, 352 U. S. 871 (1956); *Sun Theatre Corp. v. RKO Radio Pictures, Inc.*, 213 F. 284 (7 Cir. 1954); *Skouras Theatres Corp. v. RKO Corp.*, 193 F. Supp. 401 (S. D. N. Y. 1961); *Tague v. Balaban*, 146 F. Supp. 356 (N. D. Ill. 1956); *Gordon v. Lowe's, Inc.*, 147 F. Supp. 398 (D. N. J. 1956); *Leonia Amusement Corp. v. Loew's, Inc.*, 117 F. Supp. 747 (S. D. N. Y. 1953); *Manny v. Warner Bros. Pictures, Inc.*, 116 F. Supp. 807 (S. D. Cal. 1953); *Electric Theatre Co. v. Twentieth Century-Fox Film Corp.*, 113 F. Supp. 937 (S. D. Mo. 1953); *Barnett v. Warner Bros. Pictures Distrib. Corp.*, 112 F. Supp. 5 (N. D. Ill. 1953); *Alex Theatre Corp. v. Balaban & Katz Corp.*, 1952 Trade Cases, para. 67,357 (N. D. Ill. 1952). By virtue of the decision of the Court of Appeals in this case, there is now a conflict among the circuits on this issue.

2. The decision of the Court of Appeals in this case is based upon the premise that this Court's decision in *Leh v. General Petroleum Corp.*, 382 U. S. 54 (1965) overruled sub silentio in 1965 the existing law represented by the uniform line of decisions cited above. (See quotation from the Court of Appeals opinion, *supra* pp. 6-7) (Appendix B, *infra*, p. A-45).

The *Leh* case did not, however, address the issue presented here. In the *Leh* case this Court held that a private action commenced within a year of the conclusion of government proceedings was timely *as to parties to the government action* even though the private suit sought to add an additional defendant. The Court did not address itself in the *Leh* decision to the issue of whether such an action was also timely as to non-parties to the government action, and, in fact, the suit against the additional defendant who was not a party to the government action was dismissed at the District Court level. This action was noted by this Court in its opinion without comment.[9]

The Court of Appeals was incorrect in concluding that this Court in the *Leh* case, without addressing the issue and without adverting to the existing law represented by the uniform line of decisions cited above, automatically overruled those decisions and "changed" the law.

3. Moreover, the Court of Appeals wrongly concluded on the basis of the *Leh* case that the statute of limitations was suspended on the State of New Jersey's claims where the government action specifically concerned sales to a defined group of purchasers in six mid-western states and in no way involved the State of New Jersey or other eastern states. It has already been held in this litigation that the final judgment in the government action may not be introduced under section 5(a) of the Clayton Act in support of the claims of plaintiffs outside the six-state area defined in the government action. In *State of Michigan v. Morton Salt Company,* 259 F. Supp.

---

9. 382 U. S. 54 at page 61, footnote 4. See also 382 U. S. 54 at page 63 noting the similar dismissal of the private suit against a non-party to the government action in *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.,* 216 F. Supp. 507 (D. N. J. 1965).

35 at pages 71-75 (D. Minn. 1966) aff'd on other grounds, 377 F. 2d 768 (8 Cir. 1968) Judge Larson held:

> "Plaintiffs Missouri, Iowa and certain municipalities in the States of Kansas, Virginia and Tennessee share the misfortune of being outside the six-state area with which the government case was concerned. Hence the Court [in the government action] did not pass upon the existence of a conspiracy in these areas, the plaintiffs must prove independently of the decree [in the government action] the existence and operation of [a] conspiracy in their area and its impact upon them."

Judge Larson's decision was consistent with established law that private plaintiffs are entitled to utilize the government decree only if their claims involve the same geographical area involved in the government case. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U. S. 537 (1954); *International Shoe Machinery Corp. v. United Shoe Machinery Corp.*, 315 F. 2d 449, 456 (1 Cir. 1962), *cert. denied*, 375 U. S. 820 (1963); *Ohio Theater Corp. v. Loew's, Inc.*, 156 F. Supp. 770, 777 (D. D. C. 1957) *aff'd*, 261 F. 2d 380 (D. C. Cir. 1958), *cert. denied*, 359 U. S. 943 (1959).

The Court of Appeals erroneously concluded that the difference in subject matter between what was complained of in the government action and what is complained of in the State of New Jersey action did not preclude a suspension of the statute on the State's claims under section 5(b).

4. The whole question of the circumstances under which the pendency of a government action may suspend the statute of limitations on private claims against different parties or involving different subject matter should be

examined by this Court directly and explicitly. If there is to be a change in the operation of section 5(b) of the Clayton Act, as the Court of Appeals below assumed from this Court's decision in the *Leh* case, such change should be based not upon an assumption as to the meaning and scope of the *Leh* decision (which did not directly discuss these issues) but rather upon a weighing of the policy considerations involved and a clear understanding of the scope and effect of the new law.

The critical importance of certainty in determining rights and liabilities under the antitrust laws has been recognized and confirmed by this Court. *Chattanooga Foundry and Pipe Works v. Atlanta*, 203 U. S. 390 (1906). As the Court stated in *Wood v. Carpenter*, 101 U. S. 131 (1879) at p. 139:

> "Statutes of limitations are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs . . ."

Numerous cases have raised and will continue to raise the problem presented here. See cases cited at page 8 *supra;* and *Momand v. Universal Film Exchanges, Inc.*, 172 F. 2d 37 (1 Cir. 1948), *cert. denied*, 336 U. S. 967 (1949); *Charles Rubenstein, Inc. v. Columbia Pictures Corp.*, 176 F. Supp. 527 (D. Minn. 1959), aff'd, 289 F. 2d 418 (8 Cir. 1961); *Court Degraw Theatre, Inc. v. Loew's Inc.*, 192 F. Supp. 198 (E. D. N. Y. 1959); *Charles Rubenstein, Inc. v. Columbia Pictures Corp.*, 154 F. Supp. 216 (D. Minn. 1957); *Samuel Goldwyn Production, Inc. v. Fox West Coast Theatres Corp.*, 146 F. Supp. 905 (N. D. Cal. 1956); *Leonia Amusement Corp. v. Loew's, Inc.*, 117 F. Supp. 747 (S. D. N. Y. 1953); *Levy v. Paramount Pictures, Inc.*, 104 F. Supp.

787 (N. D. Cal. 1952); and *Christensen v. Paramount Pictures, Inc.*, 95 F. Supp. 446 (D. Utah 1950). Compare *Hardy Salt Company v. State of Illinois et al.*, (8 Cir. 1967) *cert. denied* (1967).

It has been assumed by the Court of Appeals in this case that the *Leh* decision, in negating the principle of co-extensiveness between sections 5(a) and 5(b) of the Clayton Act, necessarily requires the complete overruling of prior precedent and contemplates suspension of the statute as to persons not parties to the government action even as to claims different in subject matter from those involved in the government case.

Not all courts have, however, accepted this interpretation of the *Leh* case. *2361 State Corp. v. Sealy, Inc.*, 263 F. Supp. 845, 852 (N. D. Ill. 1967).

It is respectfully submitted that more important than guess-work as to the presumptive effect of the *Leh* decision is the direct weighing of the policy factors involved in this area and some clear definition of the present scope of section 5(b): what is meant by the words "based in whole or in part on any matter complained of in [the government] proceeding." Considering the number of private civil actions which follow government antitrust proceedings it is apparent that the issues raised herein regarding the scope of 5(b) will be raised time and time again in the future.

Moreover, a direct weighing of the policy considerations involved is particularly important.

It is apparent that depriving a consent decree entrant of the benefit of the statute of limitations during the continued pendency of the government action against others removes a significant incentive to enter the consent decree. The importance of such consent decrees to the government in securing voluntary action by private companies in compliance with the government's demands, without the time and expense of protracted litigation, has been universally

recognized and the government's interest in preserving the consent decree procedure has universally been considered paramount to private interests. *Swift & Co. v. United States*, 276 U. S. 311 (1928); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 323 F. 2d 412 (7 Cir. 1963), *cert. denied*, 376 U. S. 939 (1964); *United States v. American Society of Composers*, 331 F. 2d 117 (2 Cir. 1964), *cert. denied*, 377 U. S. 997 (9 Cir. 1964); Atty. Gen. Nat'l. Comm. Antitrust Rep. (1955) at p. 30; letter of Donald F. Turner to Emanuel Celler, Chairman of the Committee on the Judiciary, House of Representatives, printed in Antitrust and Trade Regulation Report No. 297, March 21, 1967, pages X-1 to X-3 (printed as Appendix C hereto). Continued future speculation and confusion regarding the effect of the *Leh* decision should be replaced with a sound evaluation of the interests, including the government's interest, involved.

5. The retroactive application of a "change" in the law to this case (if indeed the *Leh* decision was meant to and did change the law as decided by the Court of Appeals) is tantamount to a denial of due process of law. Petitioner herein entered the consent decree in the government action in 1963 at a time when it is undisputed that the existing law had uniformly held for more than fifteen years that the entry of the decree marked the termination of the action and that the period of suspension of the statute ended one year thereafter. Both parties to the present action were aware of this state of the law.[10] Respondents failed to sue

10. Originally the State of New Jersey abandoned any contention that it was entitled to any benefit from the government proceedings for statute of limitations purposes (R. 19b-20b). The State regarded the uniform law as precluding it from this contention. The following colloquy took place between the court and the State's counsel at the hearing on petitioner's motion for partial summary judgment on August 4, 1966:

"The Court: If I understand the pleadings and the briefs correctly, he (counsel for the State) is relying pretty much now

within the year and, accordingly, on November 4, 1964 the period of suspension as to petitioner ended and further suits seeking to assert claims beyond the four-year statutory period were barred.

The "change" in the law effected by this Court's decision in the *Leh* case did not occur until November 8, 1965.[11] This was over a year after the period of suspension of the statute as to petitioner had ended. The determination of the Court of Appeals that this "change" should be applied retroactively to revive the period of suspension as to petitioner, and permit this suit, deprives petitioner of the reasonable expectation upon which it acted. Petitioner is deprived both of the benefit of its bargain with the government at the time of its entry into a consent decree, and of its expectation one year thereafter that actions could be taken on the basis of the fact that the period of suspension had ended and the four-year statute alone controlled.

This Court has long recognized that retrospective application of certain decisions is not permissible when they destroy rights acquired in reliance upon earlier laws. "To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal." *Gelpecke v. City of Dubuque*, 68 U. S. (1 Wall.) 175, 206 (1863).

---

on his right or his hoped-for right to amend and plead fraudulent concealment and hence avoid the bar of the Statute of Limitations.

Is that correct, Mr. Gold?

Mr. Gold: That is correct. We admit we did not file a complaint within one year after the conclusion of International's part in the Federal case . . .

The Court: (You are) saying: if we don't have fraudulent concealment here, then we are barred from claiming anything, any damages prior to June 28, 1961, is that correct?

Mr. Gold: That is correct, your Honor." (R. 19b-20b)

11. The case of *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U. S. 331, which the Court of Appeals below considered as furnishing additional support for its theory of a "change" in the law, was decided on May 24, 1965.

> "The true rule is to give a *change of judicial construction* in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the laws by means of a legislative enactment." *Douglass v. County of Pike*, 101 U. S. 677, 687 (1879). (Emphasis added.)

This Court has recently intimated that in the area of antitrust treble damage claims it may be unfair and improper to change the law retrospectively so as to deprive persons of the expectations upon which they have acted. *Simpson v. Union Oil Co.*, 377 U. S. 13 (1964). The lower courts which have considered the question of the retrospective application of changes in the law in treble damages cases have held, as this Court intimated in *Simpson*, that justice requires denial of such retrospective application. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 377 F. 2d 776 (3 Cir. 1967), *cert. granted*, 88 S. Ct. 86 (1967); *Simpson v. Union Oil Co.*, 270 F. Supp. 754 (N. D. Cal. 1967); *Lyons v. Westinghouse Electric Corp.*, 235 F. Supp. 526, 536-7 (S. D. N. Y. 1964).

To change the uniform prior interpretation of section 5(b) and to apply such "change" so as to revive petitioner's *expired liability* herein runs afoul of these declared principles.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LEWIS H. VAN DUSEN, JR.,
DRINKER BIDDLE & REATH,
Counsel for Petitioner, International Salt Company.

HOWARD F. ORDMAN,
MORRIS R. BROOKE,
Of Counsel.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 19 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967.

No. 1345.

INTERNATIONAL SALT COMPANY,
Petitioner,

v.

THE STATE OF NEW JERSEY, on Behalf of Itself and All Others Similarly Situated, et al.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

LEWIS H. VAN DUSEN, JR.,
DRINKER BIDDLE & REATH,
1100 Philadelphia National Bank Bldg.,
Philadelphia, Pa. 19107
Counsel for Petitioner,
International Salt Company.

HOWARD F. ORDMAN,
MORRIS R. BROOKE,
Of Counsel.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

INDEX.

Page

APPENDIX A—Section 5(b) of the Clayton Act A-1

APPENDIX B:

Opinion of United States District Court for the District of New Jersey A-2

Opinion of United States Court of Appeals for the Third Circuit A-38

APPENDIX C—Correspondence on Consent-Decree Procedures Between Assistant Attorney General Donald F. Turner and Representative Emanuel Celler, Chairman of the Committee on the Judiciary, House of Representatives A-47

APPENDIX A.

Section 5(b) of the Clayton Act, 15 U. S. C. Sect. 16(b):

Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued. Oct. 15, 1914, c. 323, § 5, 38 Stat. 731; July 7, 1955, c. 283, § 2, 69 Stat. 283.

APPENDIX B

Opinion of Lane, U.S.D.J. (September 19, 1966)

In the United States District Court
for the District of New Jersey
State of New Jersey, et al., Plaintiffs,
v.
Morton Salt Company, Defendants
Civil Action No. 687-65

The Court: Gentlemen, we are dealing today with five motions. The first is Defendant International's motion for partial summary judgment. The second is Plaintiff New Jersey's motion to amend the complaint and in the alternative to file responsive pleading to allege fraudulent concealment. The third is a motion of Defendants Winans Carter Corporation and Winans Reliance Corporation and C. G. Winans Company for partial summary judgment. The fourth is Defendant Charles Schaefer Sons, Inc. for partial summary judgment with the same cutoff date, October 21, 1961, as Winans contends for. The fifth is the motion of National Oil & Supply Company for partial summary judgment with a cutoff date somewhat subsequent to the one urged by Winans because National Oil & Supply Company was not brought into the case by the amended complaint of plaintiff but rather brought in by an intervening plaintiff at some subsequent time.

The original complaint in this case was filed by the State of New Jersey on June 28, 1965, and that date is exactly four years from the date that an indictment was returned in the Federal criminal action in the United States District Court in Minnesota, filed or returned on June 28, 1961. In that Federal action, in the civil action brought by the Federal Government a few weeks after the indictment was returned, Morton, Diamond and International were defendants. Also, Morton, International and Diamond were defendants in the original complaint filed by New Jersey on June 28, 1965. When that original complaint was filed in this court, there was no timely service of it, and the summons that was to accompany the complaint. Rather, the State of New Jersey advised the Clerk

of the Court and the Office of the United States Marshal here not to effect service at that time, requesting that no action be taken regarding the service of process until further advice from the plaintiff was had.

Now, that original complaint filed by the State of New Jersey on June 28, 1965, would appear to be almost an exact copy of a complaint filed by the City of Philadelphia against the same six defendants, I think, that appeared in the original complaint filed here by the State of New Jersey. They are Morton, Pioneer, Salt Service, Incorporated, International, Cayuga, Diamond Crystal. This City of Philadelphia complaint was filed on 7-1-63, roughly two years before the New Jersey complaint was filed in this court.

Now, I have compared these two complaints, the City of Philadelphia and the State of New Jersey, and find they differ only as to the designation of the plaintiff, the City of Philadelphia, of course, substituting the State of New Jersey.

Paragraph 2 of the Pennsylvania action is omitted because it identifies the City of Philadelphia, and paragraph 4. Eastern District of Pennsylvania is changed to District of New Jersey, and a new paragraph 3 of the New Jersey complaint. Is there an additional sixth defendant in the Philadelphia case? I thought they were the same. Are they not the same?

Mr. Van Dusen: I think so.

The Court: I thought I checked them off, but I had five and I see there are six.

Mr. Ryan: There are six, your Honor.

The Court: I could check that very quickly.

Mr. Ryan: Cayuga, Salt Service, Pioneer, Diamond International—

The Court: Yes, they are the same parties. Six, there are six. They are identical parties.

As we go on paragraph by paragraph, we have an exact copy of paragraphs of the Philadelphia complaint. We come to paragraph 15 and there is a recital at the end, "Including the City of Philadelpia and the State of Pennsylvania," and in our paragraph 14 of this complaint they change to "Including the State of New Jersey."

Paragraph 17, City of Philadelphia, again State of Pennsylvania is changed to New Jersey. And damages in paragraph 23 of the Philadelphia suit are in the sum of $655,-701.51. In the New Jersey complaint, damages asked are a more modest amount, I think of $100,000, and they are the sum total of changes that I find in these two complaints.

So the State of New Jersey on the very last day of the four-year period subsequent to the filing of the United States Government action in Minnesota filed with this Court what is in all respects an exact copy of the City of Philadelphia suit against the same defendants, the Philadelphia suit having been filed two years prior.

Now, a notice of motion was filed by Defendant International to dismiss the original complaint, filed by the Plaintiff New Jersey for lack of prosecution and failure to abide by the rules of service and process, and International filed this motion October 15, 1965, made it returnable on November 1, 1965. It was adjourned to November 15, and subsequently adjourned to December 6, 1965.

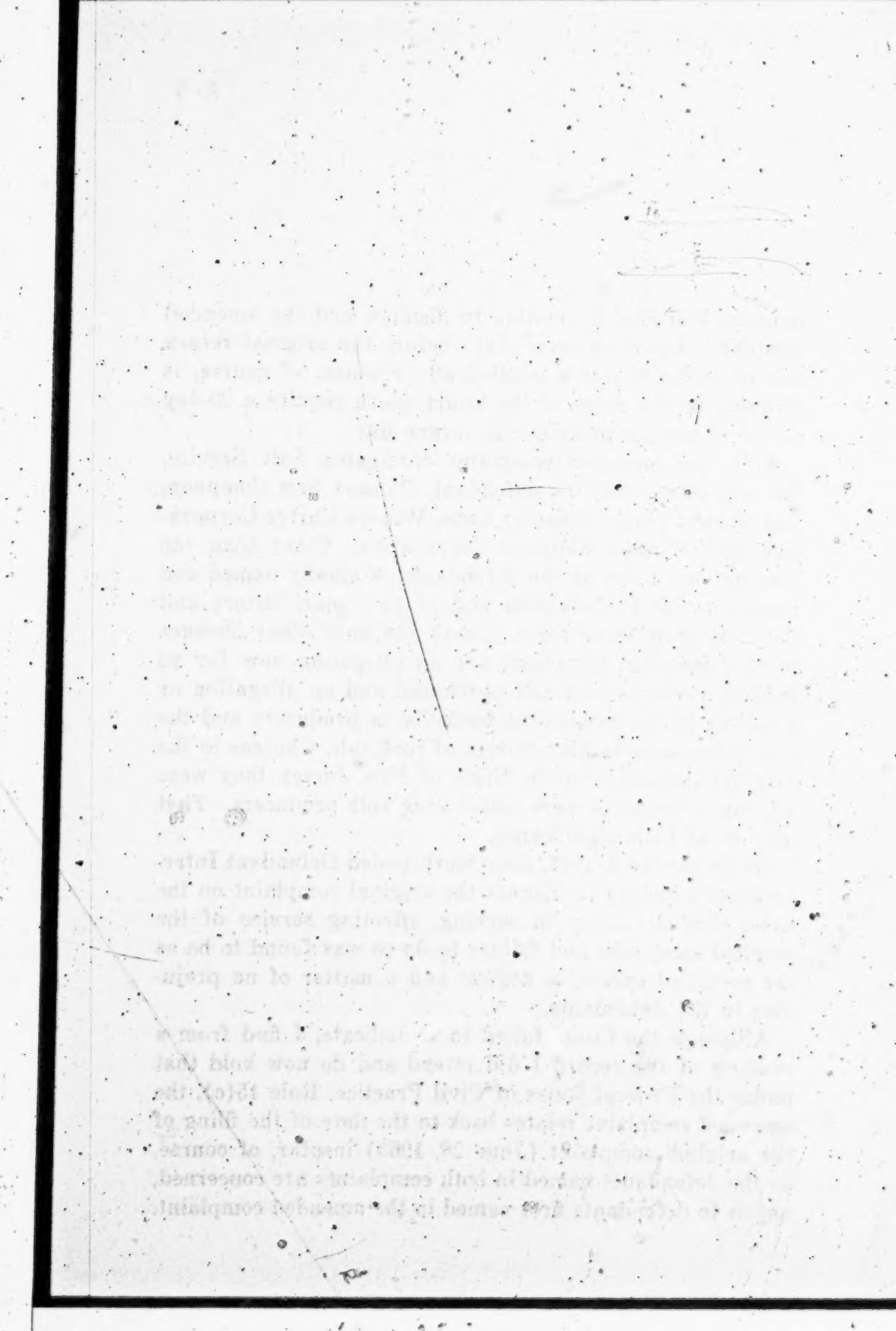
New Jersey responded by filing an amended complaint on October 25, 1965, and the service of this complaint was effected forthwith. This amended complaint of the State of New Jersey was filed ten days after Defendant Inter-

national had filed its motion to dismiss, and the amended complaint was filed seven days before the original return day of International's motion, all of which, of course, is contrary to the rules of the Court which require a 20-day notice of motion prior to the return day.

Now, the amended complaint eliminated Salt Service, Inc. and eliminated the defendant, Pioneer Salt Company, and added Charles Schaefer Sons, Winans Carter Corporation and Winans Reliance Corporation. Other than the elimination of two of the defendants originally named and named in the Philadelphia suit of two years before and the adding of these three names, the only other changes in this amended complaint are an allegation now for $2 million worth of rock salt purchased and an allegation or a calling of the retained defendants as producers and the new defendants as distributors of rock salt, whereas in the original complaint of the State of New Jersey they were all, the defendants were called rock salt producers. That may be of little significance.

On December 6, 1965, this Court denied Defendant International's motion to dismiss the original complaint on the basis that the delay in serving, effecting service of the original complaint and failure to do so was found to be as the result of excusable neglect and a matter of no prejudice to the defendants.

Although the Court failed to so indicate, I find from a reading of the record I did intend and do now hold that under the Federal Rules of Civil Practice, Rule 15(c), the amended complaint relates back to the date of the filing of the original complaint (June 28, 1965) insofar, of course, as the defendants named in both complaints are concerned, not as to defendants first named in the amended complaint.



In the conclusions given from the bench on December 6, 1965, it was observed that the plaintiff, New Jersey, did not intend to indefinitely delay service of the original complaint, but rather the delay was the result of excusable uncertainty and confusion in the Attorney General's Office, and that the four-month delay between June and October 1965 was not in itself reason to dismiss the original complaint, particularly since prejudice did not result from the delay.

During the several intervening months since the filing of the amended complaint, numerous answers have been filed, and arguments heard in court on various motions. As a result, the issue of the Statute of Limitations has been raised in pleadings and arguments approximately 30 times. Indeed, it would appear to the Court that the issue of the Statute of Limitations was the underlying reason why plaintiff, State of New Jersey, apparently copied a complaint files two years before in Philadelphia and filed it in this court on June 28, 1965, exactly four years after the return of the United States indictment returned in the District of Minnesota.

A notice of motion for a partial summary judgment was filed by Defendant International on June 29, 1966, made returnable July 26, 1966, adjourned to August 4, 1966. The purpose of this motion was to effect, that is to have this Court rule that any recovery by Plaintiff New Jersey against International be limited to a period subsequent to June 28, 1961, or four years prior to the date of the filing of the original complaint in this court.

International based its right to such relief on the grounds that a four-year statute of limitations pertains to any claim which plaintiff might have against it.

The applicable statute of limitations is 15 U. S. C. Section 16(b), which reads as follows:

> "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain or punish violations of any of the anti-trust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceedings shall be suspended during the pendency thereof and for one year thereafter: Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

International argues that the Statute of Limitations had not been tolled as to it by the pendency of a civil action by the United States against International, Morton, Diamond and others filed in the District Court of Minnesota on July 11, 1961, because International had entered into a decree for a consent judgment in that suit on September 18, 1963, effective by its terms, I believe, January 5, 1964, and International argues Plaintiff New Jersey had not filed its suit in this court within one year subsequent to International's departure from or termination in the United States civil action in Minnesota, that is on its departure on September 18, 1963.

Now, International's motion for partial summary judgment was made returnable on July 26, 1966, thirteen months subsequent to Plaintiff New Jersey's original complaint and nine months subsequent to Plaintiff New Jersey's amended complaint.

Plaintiff New Jersey again responded to International's move by filing on July 28, 1966, a motion seeking permission to again amend its complaint or in the alternative to file a responsive pleading so as to include an allegation of fraudulent concealment of the conspiracy.

Obviously the motion to amend, if granted, would defeat International's motion for partial summary judgment based on the June 28, 1961, cut-off date.

In keeping with its practice throughout the course of this litigation, plaintiff, in filing its motion, failed to comply with the rules of this court. Its motion was filed only seven days before its return date, which was made to coincide with the date to which Defendant International's motion had been adjourned, August 4, 1966.

Thus, the motion for the right to amend was filed by Plaintiff State of New Jersey nine months subsequent to the filing of its amended complaint and thirteen months subsequent to its original complaint.

On August 4, 1966, when argument was had on International's motion for partial summary judgment, counsel for Plaintiff New Jersey conceded that its complaint had not been filed within the one-year period following International's termination in the Rock Sale anti-trust suit filed by the United States Government in Minnesota in 1961 and argued for the right to amend and thus avoid the effect of the four-year statute of limitations by allegations and

later proof of defendants' fraudulent concealment of their alleged conspiracy.

However, the concession made by plaintiff was made prior to plaintiff's learning of the decision handed down by Judge Larson of the United States District Court for the District of Minnesota on July 28, 1966.

At page 19 of Judge Larson's decision, in summary he states that he has determined:

> "1. That the date which governs the commencement of the tolling of the statute of limitations under Section 5(b) of the Clayton Act is June 28, 1961."

I think I should note, of course, that this memorandum decision was handed down in the cases of the State of Michigan, and all Related Cases Pending in the District of Minnesota, versus Morton Salt, International, and others that appear in this case.

> "2. That the date which governs the termination of the tolling of the statute of limitations under Section 5(b) of the Clayton Act is October 25, 1966."

That is a date which we have not as yet arrived at.

> "3. That Section 5(b) of the Clayton Act applies to all defendants named in these treble damage actions.
>
> "4. That all plaintiffs, including intervenors and members of a class, are entitled to the benefits of Section 5(b).
>
> "5. That the matters complained of in these treble damage actions are based in whole or in part on

the Government litigation within the meaning of Section 5(b)."

If Judge Larson's rulings were to be followed by this Court, all pending motions for partial summary judgment would be denied without regard to plaintiff's proposed amendment. This is so because Judge Larson has held that October 25, 1966, is the date governing the tolling of the Statute of Limitations.

However, the issue of termination resulting from one of several defendants entering into a consent decree prior to the conclusion of Government proceeding against other defendants in an anti-trust suit has been litigated in this District Court for the District of New Jersey in the case of Gordon v. Loew's, Inc., 147 F. Supp. 398, affirmed 247 F. 2d 451 (3rd Cir. 1957).

In this case Judge Wortendyke at page 413, having discussed the Leonia Amusement case, which was heard in New York, Southern District of New York, stated as follows:

> "The moving defendant points out that it has been judicially determined that United States v. Paramount Pictures terminated as to RKO on November 8, 1948, the date upon which the defendant entered into a consent decree in that litigation. Grengs v. Twentieth Century-Fox Film Corp., 7 Cir., 1956, 232 F. 2d 325, certiorari denied 352 U. S. 871, 77 S. Ct. 96. In accordance with Section 16 of Title 15 U. S. C. A., the New Jersey six-year statute of limitations began to run against the plaintiff herein on November 8, 1948.

"Inasmuch as this action was commenced on March 3, 1955, all claims which accrued to plaintiff prior to March 4, 1949, are barred by the New Jersey Statute of Limitations. To that extent, the motion of RKO for summary judgment will be granted."

Now the history prior to the Gordon case is that in 1938 the Government had brought a civil action against various exhibitors or distributors in the movie industry. The litigation continued until 1952. However, Defendant RKO then entered into a consent decree on November 8, 1948, and in the Loew case the complaint was initiated on March 3, 1955, and one of the defendants there, RKO, moved for summary judgment on the ground of the Statute of Limitations, and Judge Wortendyke of this district, applying the six-year New Jersey statute, held the Government action terminated as to RKO on November 8, 1948, the date upon which the defendant entered into a consent decree in the litigation.

On appeal, the Third Circuit held the applicable New Jersey Statute of Limitations was two years rather than six years, and thus did not touch on the question of when the Government action against RKO ceased to pend.

Now, other courts have reached the same conclusion the District Court of New Jersey reached in the Gordon v. Loew's Incorporated. In an appeal from the dismissal of the complaint because of the Statute of Limitations, it was held in Grengs v. Twentieth Century-Fox Film Corporation, 232 F. 2d 325, Seventh Circuit, certiorari denied 352 U. S. 871, 77 Supreme Court 96, and I quote:

"These decrees became final on appeal within two years prior to the filing of the suit at bar. Hence

> this action was not barred by the statute of limitations, except as to defendants RKO Radio Pictures Incorporated and Paramount Film Distributing Corporation. The latter two defendants entered into consent decrees on November 8, 1948 and March 3, 1949, antedating the commencement of this action by more than two years. As to them the order and summary judgment of the district court is affirmed."

A similar conclusion was reached in Manny v. Warner Bros. Pictures, 116 F. Supp. 807, Southern District of California, 1953, wherein the Court stated, at 809:

> "In the case at bar the consent decree as against Paramount was entered on March 3, 1949, and the action was terminated upon the entering of the decree. It would seem unjust to say to Paramount after such a consent decree had been entered and the action terminated as to them that the statute of limitations did not commence to run at that particular time but would be postponed until some future date when judgments were obtained and became final against all of the other defendants."

In Sun Theatre Corp. v. RKO Radio Pictures, Inc., 213 F. 2d 284, Seventh Circuit, it was stated at 292:

> "Plaintiff's position is twofold. Thus we must determine, 1. whether the Paramount case continued to pend against these defendants, thus tolling the statute of limitations as to them, until the cause was determined as to all defendants, notwithstanding the prior entry of the consent decrees; and 2. wheth-

er, if the consent decrees are held to be final, that action was nevertheless pending against said defendants within the meaning of Section 5 in view of the various orders entered subsequently thereto modifying those decrees in certain respects.

"The first contention has been urged and rejected by the courts in at least three well considered decisions by district courts. Barnett v. Warner Bros. Pictures Distributing Corp., D. C., 112 F. Supp. 5; Alex Theatre Corp. v. Balaban & Katz Corp., CCH 1952 Trade Cases, Par. 67,357; Manny v. Warner Bros. Pictures, Inc., D. C., 116 F. Supp. 807. In the Barnett case the court said of the consent decrees against these defendants in U. S. v. Paramount, 'It is the opinion of the court that the pendency of a government suit ends (1) when final judgment has been entered after trial and appellate proceedings are concluded, or (2) when final judgment is entered by consent of the parties. Any other construction of Section 5 would lead to long, and in some instances permanent suspensions of all statutes of limitations. Congress could not have intended such a result.' 112 F. Supp. at page 7."

In addition, at page 292, the Court said:

"The consent decrees against the RKO and the Paramount defendants were essentially final in character. From the date of their entry the complaints of the government against the respective defendants were terminated. At that time the purpose of the tolling provisions had been served, and, logically,

> the statute of limitations commenced to run. To hold that the statute is tolled as to all defendants in a government suit until that suit is terminated as to every defendant would result only in placing a premium on dilatoriness and stale litigation."

See also the cases cited by Judge Wortendyke in the Gordone case, particularly Leonia Amusement Corporation v. Loew's, Inc., 117 F. Supp. 747, where it was held the defense of the statute of limitations was tolled as to all defendants that were parties to the Paramount suit, but considered separately, each defendant, determining when the Government action as to that defendant ceased to pend. See also Tague v. Balaban, 146 F. Supp. 356 (Northern District of Illinois 1956).

Again, in Sun Theatres Corp. v. RKO Radio Pictures, Inc., a case cited above at 213 F. 2d 284, the Court was called upon to determine whether consent decrees against two of several defendants, entered more than two years before commencement of the damage case, had terminated the action as to them. In sustaining the defense of the statute of limitations, the Court held, at 293, 294:

> "Plaintiff's reliance on modifying orders entered subsequent to entry of these consent decrees to support its contention that the Paramount case continued to pend against RKO and the Paramount defendants after decrees were entered as to them is, we think, misplaced.
>
> "The court's decree of injunction is no less final merely because from time to time expediting orders are necessary to effect its enforcement.

> "We conclude that the two year statute of limitations, although suspended originally as to RKO and the Paramount defendants by the pendency of U. S. v. Paramount, began to run in favor of these against them in that case on November 8, 1948 and defendants when consent decrees were entered March 3, 1949, respectively. Plaintiff's claim is now barred."

Again, at page 293 the Court stated:

> "If we should adopt the rule for which plaintiff contends, pendency of the Paramount case as to consenting defendants would be coextensive with the power of the court to enforce its decree, encompassing an indefinite period of time with no foreseeable limits. So construed, Section 5 might, as defendants suggest, suspend the running of statutes of limitations forever. The mere statement of this proposition illustrates its fallacy. Had Congress intended to deny the benefit of limitation statutes to violators of the antitrust laws, that intention would have been clearly expressed. If we cannot imply that general intent, we should not presume that Congress intended that limitations be forever suspended as to the wrongdoer who is caught while the violator who evades detection may invoke their protection. The court's decree of injunction is no less final merely because from time to time expediting orders are necessary to effect its enforcement."

In the present case, International's consent decree would seem to have become binding when it was entered on No-

vember 3, 1963. After that date, as between the Government and International, there were no longer any issues left for adjudication.

Gentlemen, by comity and tradition, brother judges of a multiple-judge district court customarily follow a previous decision of a brother judge upon the same question, except in unusual and exceptional circumstances or unless required by higher authority to do otherwise.

In re Petition of Marko Jerzick, 153 F. Supp. 651, 653 (Western District of Pennsylvania 1957) and U. S. v. Jannuzzi, 22 FRD 223 (District of Delaware 1958).

And it is my intention to follow Judge Wortendyke's decision in the Gordon case.

Thus, applying that decision to the pleadings in their present posture, I must necessarly hold Defendant International terminated its participation in the Government's Minneapolis suit in the fall of 1963, and therefore Plaintiff New Jersey's complaint was filed more than a year subsequent to such termination, and that it therefore follows that the four-year statute of limitations is applicable to International and it is entitled to the granting of its motion unless plaintiff is granted the right to amend its complaint to plead fraudulent concealment.

As to Defendants Winans Carter Corporation, Winans Reliance Corporation and C. G. Winans Company, Defendant Charles Schaefer Sons, Inc. and Defendant National Oil and Supply Company, these defendants were not parties to the United States Government's Minnesota action, and they were not made parties to the original complaint filed by Plaintiff New Jersey on June 28, 1963.

Defendants Winans and Schaefer were first made parties by plaintiff upon the filing of the amended complaint on

October 23, 1965. Defendant National Oil & Supply was brought in subsequently by an intervening plaintiff.

Thus it would appear that these defendants are entitled to the granting of their motions for partial summary judgmenting, restricting damages to the four-year period immediately preceding their respectively being brought into the litigation as parties defendant.

In New Jersey Wood Finishing Company v. Minnesota Mining and Manufacturing, a like fact situation was ruled upon by Judge Augelli of this court, and as pointed out in full in the brief of Winans filed in support of its motion, Judge Augelli ruled:

"The complaint be and the same hereby is dismissed with prejudice as against the defendant Essex Wire Corp. with respect to plaintiff's claim for relief against that defendant for violation of Section 7 of the Clayton Act," on the basis that Essex Wire had not been made a party defendant in a Government anti-trust suit.

And then in an additional paragraph he provides:

> "Plaintiff is given leave to amend the complaint as against defendant Essex Wire Corp. to allege with the requisite particularity overt acts in violation of the Sherman Act committed with four years immediately preceding the filing of the complaint in this matter."

Also, several of the cases I have discussed were set out in the brief of International in support of its motion and cover this very point about non-defendant companies, non-defendants in Government suits not being subject to suspension of the Statute of Limitations, provision 5(b).

Again, Judge Larson has ruled that Section 5(b) may be applied to non-Government defendants—to defendants who were "too low in the conspiracy" to be included as named defendants, or even named co-conspirators in the Government suit.

However, the precedent handed down by Judge Augelli is to be followed here, and defendants' motions will be granted, again subject to whatever action is taken in regard to the plaintiff's motion for right to amend its complaint.

Should higher authority adopt in whole or in part the conclusions that Judge Larson has reached, appropriate relief may be granted by this C[illegible]rt by way of adjustment of any limitation that may be now imposed so as to then conform to the then law of the case.

Now we turn to a consideration of the merits of plaintiff's motion to amend to include the allegations of fraudulent concealment.

Rule 15(a) provides leave to amend "shall be freely given when justice so requires."

Paragraph 21 of the proposed amendment reads as follows:

> "The aforesaid combination and conspiracy necessitated frequent communications among defendants and the co-conspirator companies. These communications were made under the cover of legitimate trade practices. As a result of said communications and other acts done by defendants and the co-conspirator companies for the purpose of actively and fraudulently concealing the existence of the aforesaid combination and conspiracy, plaintiff and inter-

venor plaintiffs neither had knowledge, nor by the exercise of reasonable diligence could they have learned, of the existence of such combination and conspiracy until they first became aware of the government proceedings in July 1961, as hereinafter set forth in Paragraph 22 of this Amended Complaint."

As was clearly stated during the argument had on August 4, the Court is not to determine at this point whether proof of fraudulent concealment has or has not been presented. Rather the determination is as to whether or not "justice requires" that the plaintiff be allowed to amend the complaint as proposed.

In considering that issue, it might be well to state a few definitions of the term "fraudulent concealment."

In the Philadelphia Electric Company cases tried by Judge Lord of the Eastern District of Pennsylvania, in giving instructions on plaintiff's burden to establish fraudulent concealment, he states:

"Now, I mentioned to you that the second prong of the defense was the statute of limitations . . . .

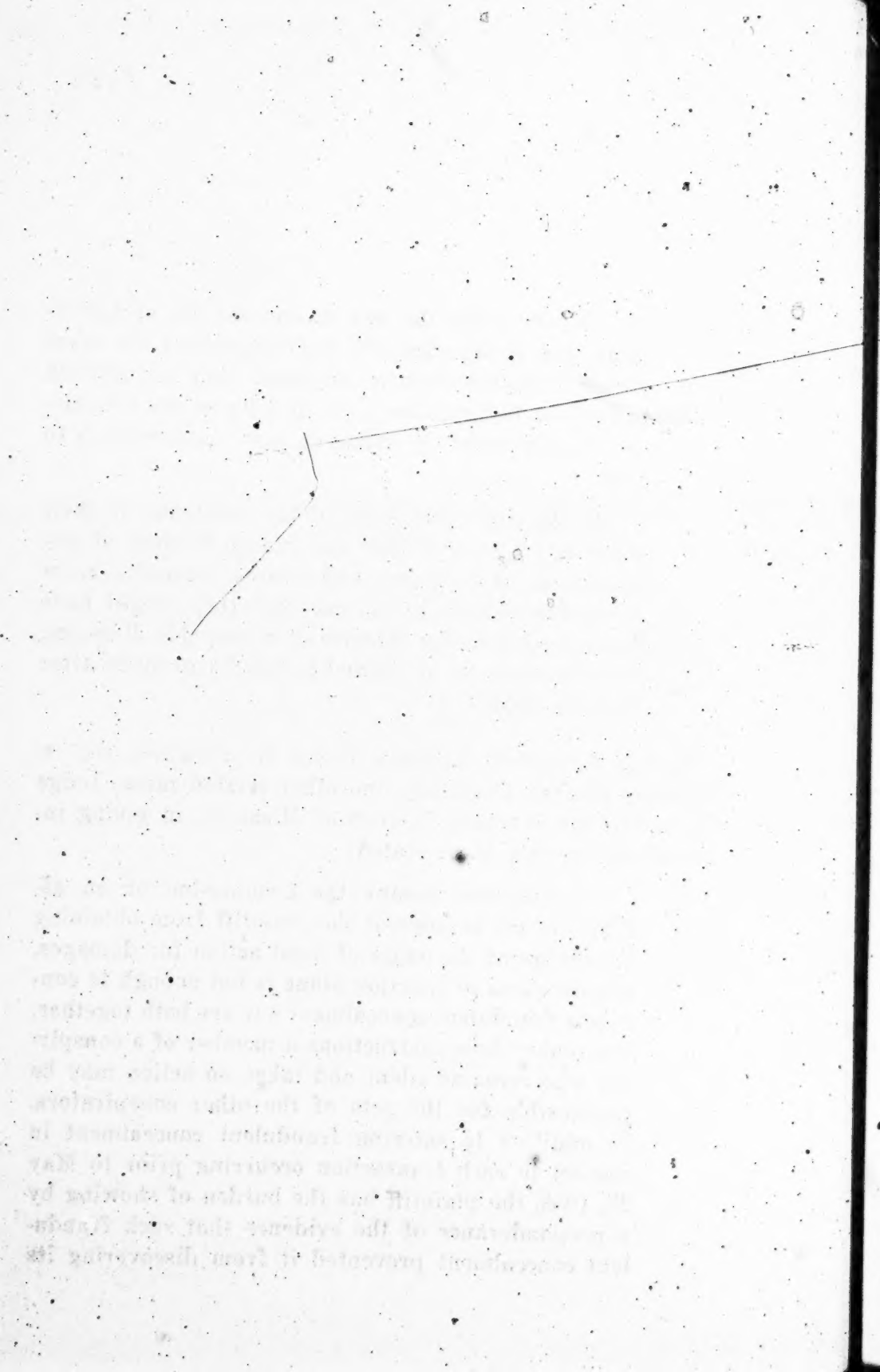
"This is a valid defense unless the defendants here fraudulently and effectively concealed any conspiratorial activities in which they were engaged. If you find that a conspiracy existed and that the plaintiffs were unable to discover the existence of that conspiracy, that the defendants took affrmative steps to conceal their part in the conspiracy and that these steps were successful, then the defendants are

not free to raise the bar of the statute of limitations, and if the plaintiffs have sustained the other elements of their burden of proof, they are entitled to recover for purchases for as long as the conspiracy existed under the evidence here; namely, back to 1946.

"If the plaintiffs knew of the existence of their cause of action or if they had reason to know of any agreement or collusion, and having reason to know or having reason to believe that they would have discovered it in the exercise of reasonable diligence, then the recovery is limited to purchases made after May 25, 1956."

In the Northwest Electric Power Cooperative, Inc. v. Moloney Electric Company, and other related cases, Judge Becker of the Western District of Missouri, in giving instructions on this issue stated:

"Concealment means the commission of an affirmative act to prevent the plaintiff from obtaining knowledge of the cause of legal action for damages. Silence alone or inaction alone is not enough to constitute fraudulent concealment nor are both together. But under these instructions a member of a conspiracy who remains silent and takes no action may be responsible for the acts of the other conspirators. In addition to showing fraudulent concealment in respect to each transaction occurring prior to May 25, 1956, the plaintiff has the burden of showing by a preponderance of the evidence that such fraudulent concealment prevented it from discovering its



cause of legal action for damages. And that by the exercise of reasonable diligence it could not have discovered its cause of legal action for damages in respect to the transaction in question . . . ."

Again, in the City of Burlington, Vermont, and others, v. Westinghouse Electric Corporation, an electric equipment conspiracy case, Judge Sirica of the District of Columbia, again instructing on plaintiff's burden to establish fraudulent concealment, stated as follows:

> "The exception to the normal operation of the statute of limitations to which I have referred, and upon which plaintiff relies, is known as the doctrine of fraudulent concealment. Simply stated, the doctrine of fraudulent concealment is this: That because of affirmative actions taken by the defendants to conceal their activities, if any, in violation of the antitrust laws the plaintiff claims that it did not know and could not, by the exercise of due diligence, have learned enough about the existence of such activities to be put on notice that it may have had a claim against defendants so as to permit plaintiff to bring suit upon that claim within the period normally allowed by the statute of limitations."

Now, in the light of those definitive assertions, I intend to talk now on the proofs submitted by both sides on the motion for the right to amend.

Defendant International has submitted a letter dated March 21, 1960, written by Burrell Ives Humphreys, Deputy Attorney General of the State of New Jersey, to the

Division of Antitrust, Department of Justice, in which he states:

"Dear Sir:

"The State of New Jersey has been receiving identical bids from various concerns for the supplying of rock salt. We have been informed that your office is currently investigating the submission of identical bids to federal agencies for the supplying of rock sale.

"We should appreciate very much receiving any information which you may have with respect to this problem. Specifically, we should like to know the concerns who are being investigated, the statuts of the investigation and the persons or branches of government in charge of this investigation."

Further, a clipping from the New York Times of August 5, 1960, entitled, "Rock Salt Inquiry Broadened by U. S.

"Special to The New York Times.

"The Justice Department has broadened an inquiry into allegations of price-fixing on the rock salt that is used to melt ice on the nation's streets and highways.

"The anti-trust division has requested data from forty cities, including New York, and from an unspecified number of state agencies, including the Port of New York Authority, it became known today.

"The data are to be presented to a Federal grand jury, now in recess," and so on and so forth.

Then, also, there appears a Trenton date of August 4 in that same clipping.

> "New Jersey will receive bids Aug. 16 on 21,000 tons of rock salt for ice control. Charles F. Sullivan, State Director of Purchase and Property, said today he hoped the bids would produce competition. Last year only three identical bids were submitted."

Then a clipping of the Newark Evening News in their edition of August 17, 1960, entitled "Economy Move. "State Eyes Rock Salt Substitute," and it says under AP Trenton byline:

> "Charles F. Sullivan, New Jersey director of purchase and property, is going to find out if a substitute for rock salt can be used to clear snow and ice from state highways.
>
> "The division received five bids yesterday on a contract to supply the state with 21,000 tons of rock salt.
>
> "Sullivan said four firms based their offers on a price of $8.40 a ton at the mine, plus shipping costs. But he said one firm submitted a much lower price for a synthetic material which it manufactures. The firm is the Monroe Co. of Cliffwood.
>
> "May Test Material
>
> "The offer will be studied by his division and the State Highway department as rapidly as possible, Sullivan said, and the material may be tested. He said it must be determined if the material can be

transported and stockpiled easily, if it will work in the department's salt spreaders, if it will damage road surfaces, and if it is as effective as salt.

"Favorable reports might cause the division to throw out all the bids received yesterday, change the specifications in the contract and advertise for new bids, Sullivan said.

"Sullivan has been trying for more than a year to bring about what he considers competitive bidding on rock salt and to break through the prevailing price.

" 'As far as the sources of supply are concerned, we got no competition,' he commented of the bids yesterday."

A further clipping from the Newark Evening News dated September 2, 1960, under a heading, "Salt Price Action Due.

"State Seeking to Break Industry's Policy of No Competition.

"Trenton (UPI)—Gov. Meyner will confer with state officials Sept. 13 in an attempt to break the fixed price policy of the rock salt and calcium chloride industry.

"Charles F. Sullivan, state director of purchase and property, announced yesterday that six identical $116,051 bids had been received for supplying 2,970 tons of calcium chloride.

"Calcium chloride is mixed with rock salt to speed up the melting properties of rock salt in very cold

weather. The Highway Department spreads the mixture on roads.

"Earlier the state received two identical $589,444 bids for supplying 21,985 tons of rock salt for coming winter needs.

"Sullivan, State Treasurer John F. Kervick and Highways Commissioner Dwight R. G. Palmer will confer with the governor on the problem, Kervick said.

"'We may try to take steps to break up the fixed bidding,' Kervick said.

"A federal grand jury sitting in Chicago has launched a national investigation of prices in the rock salt industry."

Then a further clipping taken from the Trentonian, a publication here in the State Capitol dated September 14, 1960, under the heading, "State Will Fight Salt, Chloride Price Fixing," and it reads:

"The state decided yesterday to go to court in an attempt to break up fixed-price bidding by rock salt and calcium chloride suppliers.

"Gov. Meyner made the decision in a private conference with Purchase and Property Director Charles F. Sullivan, Highway Commissioner Dwight R. G. Palmer and State Treasurer John A. Kervick.

"The State recently received six identical bids of $116,051 for supplying 2,970 tons of calcium chloride,

which is mixed with rock salt to trigger the latter's ice-melting ability in cold weather.

"Earlier, the state received two identical $389,444 bids for supplying 21,985 tons of rock salt.

"Kervick said award of the contracts will be held up until the attorney general can initiate legal action.

"Sullivan said New England states bought rock salt for $5.40 a ton (at-mine-rate) last year from the same companies that charged New Jersey $8.40 a ton.

"Kervick explained the state will have to award contracts before winter sets in, because the contracts represent the state's entire year's purchase of highway ice-melting chemicals. But he said the price could be open to revision if the state gets court relief.

"The bidders who were awarded last year's contracts in fixed-price bidding are among the identical bidders this year, Kervick said. These bidders are suppliers, but 'the price is fixed at the source of supply, which prevents competitive bidding', Sullivan said recently.

"Kervick said the attorney general will decide whether New Jersey will join in a federal court action already under way in Chicago or will initiate its own suit under state laws."

Then there is a letter from the State of New Jersey signed by Burrell Ives Humphreys, Deputy Attorney Gen-

eral, written to Honorable Robert A. Bicks, Acting Assistant Attorney General, United States Department of Justice, Room 404, United States Courthouse, Chicago 4, Illinois, in which he talks about bids submitted by Charles Schaeffer & Sons of Elizabeth, G. C. Winans Company of Newark, American Oil and Supply, information which he apparently received from the Essex Board of Freeholds, and again says:

> "Will you please tell me the present status of the Grand Jury investigation into rock salt and what future developments we may expect."

That is dated October 2, 1960.

Then there is attached to these other proofs a form sent out by the Antitrust Division from the United States Court House, Chicago 4, Illinois, dated May 10, 1960. This form was submitted to the Purchasing Division of the New Jersey Highway Authority, and it is termed, "Survey Relating to Rock Salt Purchases by State, County and Municipal Agencies."

It asks, among other things, or it has set out in here the dollar value and quantity of rock salt purchased for each of the years during the period 1957 through 1959. It asks with respect to each instance in which identical bids were received, "state any facts or circumstance which tend to support the conclusion that the identical bids received resulted from collusion among the bidders," and other similar inquiries.

This document is some six or seven pages long.

There was also included in this proof submitted by International, Defendant International, a letter dated March

13, 1958, signed by William L. Brach, Chairman, Central Purchasing Committee, City Council, the City of East Orange, New Jersey, which was addressed to the Honorable Victor R. Hansen, Assistant Attorney General, Anti-Trust Division, Department of Justice:

> "I have been directed, on behalf of the East Orange City Council, to call to your attention the following facts on bids for Rock Salt received by The City of East Orange over the past three years. A schedule of said bids is attached hereto.
>
> "It would appear to us, on the face of it, that there is no competition among the respective bidders as the field has been limited to two bidders whose bids match to the penny.
>
> "We are convinced that we are not obtaining the benefits of competition in this area and surmise that the experience of other municipalities is similar to ours.
>
> "We would appreciate your advice as to whether action under the anti-trust laws has been initiated or is contemplated."

A letter dated April 27, 1960, written by Victor R. Fischer, Treasurer, Department of Purchase, Town Hall, West Orange, New Jersey, to Earl A. Jinkinson, Esp., Chief, Midwest Office, Antitrust Division, Chicago 4:

> "Dear Sir:
>
> "Enclosed please find prepared questionnaire which you requested in your letter of April 13, 1960, in regard to Grand Jury Investigation of Possible Antitrust Violations in Sale of Rock Salt."

That covers most of the proofs submitted by the defendant.

The State of New Jersey in answer to that type of proof has submitted an affidavit of Burrell Ives Humphreys, Deputy Attorney General of the State of New Jersey between the years 1959 and 1962. He is now in private practice.

Paragraph 3 says:

> "When I first became involved in matters concerning identical bidding I came into possession of a file in the office of the Criminal Investigation Section dating back to 1955 wherein there was data indicating identical bids had been submitted from bidders for the supplying of various commodities for State use, including rock salt. The data indicated that submitting of uniform bids for rock salt had been a continuing practice.
>
> "4. From 1959 through 1961, I received considerable data concerning identical bids for rock salt. Also during that period our office was in contact with the United States Department of Justice, Antitrust Division, and we supplied this agency with data on identical bids.
>
> "5. Although we made numerous efforts to obtain information from various sources concerning the reason for the high incidence of identical bids for rock salt, we were unsuccessful in developing information upon which in my opinion we could predicate a successful legal action for conspiracy to fix prices.

"6. On April 28, 1960, I drafted an extensive memorandum concerning, *inter alia*, federal antitrust violations and conspiracies to violate the Federal Antitrust Law by fixing prices. In that memorandum I indicated to Attorney General David D. Furman, through the Director of Criminal Investigation Section, that we did not know of any agency arrangement made among the rock salt bidders; nor how the identical prices were reached; and that in my opinion we did not at that time have adequate proof of a conspiratorial agreement in violation of the antitrust laws. Accordingly I recommended against litigation at that time. My recommendation was followed. During 1960 and 1961 we continued to accumulate information concerning identical bidding but without being able to develop information upon which to base a suit under the antitrust statutes."

He talks about during 1960 receiving information from the New Jersey Turnpike Authority and the New Jersey Highway Authority, copies of reports to the United States Department of Justice Antitrust Division, copies of which are attached hereto. He makes reference in Paragraph 8 to the September 14, 1960, issue of "The Trentonian," and he says:

"I have also been advised that the defendants in the above-entitled suit are relying upon this news release as evidence of the State's knowledge of a conspiratorial arrangement in the rock salt industry. Information contained in the file indicates that no such order was issued and that the newspaper

article was incorrect in that regard. To the best of my recollection, the State at the time of the publication of said newspaper article possessed no more information concerning any collusive agreement in violation of the antitrust laws with respect to rock salt beyond that of identical bids with which the Attorney General's office had already been familiar for some time.

"9. On July 6, 1961, the Criminal Investigation Section of the Attorney General's office received a newspaper clipping from the 'Philadelphia Inquirer' dated June 29, 1961, referring to an indictment by a Federal grand jury of 'four of the nation's leading salt companies.' Subsequently, on July 14, 1961, I received a letter dated July 12, 1961, from the United States Department of Justice advising me 'that on June 28, 1961 a federal grand jury sitting at Minneapolis Minnesota, returned a True Bill' "

against Morton, International Salt, and others for unlawful conspiracy.

He says that the Attorney General's files revealed no copies of these newspaper articles. He was unable to comment upon them without having them available.

He believes there is nothing in the office that would indicate such articles were called to the attention of the Attorney General or brought to the State's attention over and above what was already in its possession, and that the Attorney General did not at any time while he was in office order any investigation to be undertaken with respect to collusive bidding in the rock salt industry in vio-

lation of the antitrust statutes beyond the accumulation of bidding information and cooperation with other governmental bodies.

Then he includes or attaches to his affidavit a letter dated June 7, 1960, from the Garden State Parkway by D. Louis Tonti, Executive Director, a letter of transmittal forwarding the information he had sent to the Antitrust Division of the Federal Government. There is a list of vendors to whom bids were forwarded from 1955 to that date. It has bid opening dates, first bid, bid made, and so forth. It is Turnpike information given to the Antitrust Division showing the history of bidding by various companies in New Jersey.

There is a letter dated October 21, 1960, written by the Port of New York Authority by Sidney Goldstein to Hon. David R. Furman, Attorney General, which says:

> "In accordance with my telephone conversation with you the other day, I have forwarded to the U. S. Assistant Attorney General, in charge of antitrust, information on bids received by the Port Authority for rock salt, in connection with the Justice Department's investigation of rock salt prices. A copy of my letter together with a tabulation of bids received by the Port Authority is enclosed.
>
> "If you should wish any further information, I will, of course, be happy to furnish it."

Then there is a copy of a letter written by Sidney Goldstein to the Hon. Robert A. Bicks, Assistant Attorney General, dated October 21, 1960, concerning Rock Salt Bids, et cetera. That would appear to be the most pertinent of the proofs.

In addition to that, the State of New Jersey has filed a copy of the deposition of Edward L. Fuller, who is and has been the President of International Salt Company, defendant, since 1931. I have carefully gone through this deposition, and it contains nothing of affirmative value, as I see it, in regard to fraudulent concealment. As a matter of fact, I think the State offers it in sort of a negative way to show Mr. Fuller knew nothing and hence how could the State of New Jersey be expected to know about this.

In Philco Corporation v. Radio Corporation of America, 186 F. Supp. 155 (1960), it is stated:

> "Philco, through its top officials, was thus informed of the very facts which it then recognized as constituting a 'tortious interference in Philco's contract negotiations and a violation of the anti-trust laws,' (page 31 of plaintiffs' brief),"

—I am not sure what that is—

> "and which they now allege as the very claim for relief which was concealed from them. We emphasize the point that they were not given facts which create suspicion or indicate the possibility of a claim for relief based upon the antitrust laws. Rather they were given the essential facts now constituting their claim for relief (minus only the fact of injury to the public and to themselves). And they recognized them as constituting a cause of action at that time. The knowledge of such facts constituted knowledge of the cause of action now claimed to have been concealed. Such knowledge negates the existence of an element essential to the defense of concealment."

Also, in Kansas City, Missouri v. Federal Pacific Electric Co., 310 F. 2d 271 (1962), I quote:

> " 'To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side.'
>
> • • •
>
> " '• • • we hold that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him.' " 88 U. S. at pp. 349, 350.

The State of New Jersey in its brief cites Kansas City, Missouri v. Federal Pacific Co., 310 F. 2d 271 (8th Cir. 1962), and in a quotation from that case it appears:

> "In summary, we hold that the fraudulent concealment doctrine is to be read into the statute of limitations so that under circumstances here allegedly present, the limitation period begins to run from the time that plaintiff by the exercise of reasonable

diligence, discovers or should have discovered the cause of action."

Further, in that brief they cite the landmark case of Bailey v. Glover, 88 U. S. 342, 22 L. Ed. 614 (1874).

"that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.' "

Gentlemen, I have carefully weighed the proofs before me and all that I have talked about today, and I am compelled to the conclusion that there has been negligence, laches on the part of the plaintiff, New Jersey, in this case. The claim of collusion, of violation of the antitrust law was open and notorious certainly in 1960. Claims of this nature from reputable people, and statements appeared in various newspapers throughout the eastern seaboard, and it seems to me that New Jersey very clearly on the proofs before me—and I am not determining whether or not there was fraudulent concealment—but on the proofs before me has been negligent, guilty of laches in not proceeding to investigate further and further as to all the publicity, and this knowledge called for it to do so,—and not proceeding forthwith and filing a suit in this court, not on the last day of the four-year period but rather much sooner and including all the allegations that it might have, includ-

ing the one asked for now of fraudulent concealment long before this original suit was filed.

On that basis it is my determination in the interest of justice that I am required to deny the petition or request of the State of New Jersey for the right to amend to include the allegation of fraudulent concealment.

Mr. Ryan: Do I understand correctly, then, your action in denying this motion also results in the granting of our motion for partial summary judgment?

The Court: Yes, sir. After the granting of that motion, subject to anything on appeal, but subject more particularly to any subsequent adjudication of Judge Larson's holdings, because if his holdings, any one or more or all become the law of this case, then I would expect the application to be made before me for an adjustment in accordance with whatever the law may then be as to the periods of damages provable.

Mr. Brochin: Your Honor, of course interrogatories have been submitted to the local defendants by the plaintiff and intervenors. May we assume that the period as to which answers must be supplied in answer to those interrogatories now is shortened to the period limited by the partial summary judgment?

The Court: No, I think not. I think we must be much broader and continue to be by way of discovery for matters of proof that may seem cumbersome to you but may lead up to actual proof of the four-year, damage occurring, if any, during the four-year period I have indicated. It may be before we are finished with this case it will be much greater than four years. I think we ought to have broad inquiry, still.

Mr. Brochin: Since I raised this right off the top of my head, I hope that your Honor's comments won't preclude us from moving to suppress particular interrogatories which we may think would be relevant only to damages if the damages were allowable prior to the four-year period.

The Court: I couldn't lay out some offhand rule now that would cover all contingencies. You are not barred from moving here, there and elsewhere where you think you should.

Mr. Lichtenstein: Do you want an order presented with regard to your decision?

The Court: I certainly do.

Mr. Lichtenstein: Circulated and consented to by all counsel prior to being submitted to you?

The Court: Yes, sir.

Mr. Gold, I assure you and your associates that there is no intent on my part to be critical of you or any of your associates personally. I think this is long-range neglect by plaintiff. I know that you have been assigned a thousand duties, not just the rock salt duties. I intend nothing along those lines at all, and it is hardly necessary for me to state so, but I want it clear on the record.

Gentlemen, anything further?

(Discussion off the record.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 16397 16517
16398 16518
16399 16519

THE STATE OF NEW JERSEY, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

AND

COUNTY OF BERGEN, A BODY POLITIC AND CORPORATE OF THE STATE OF NEW JERSEY,
Intervening Plaintiff-Appellant,

AND

NEW JERSEY HIGHWAY AUTHORITY,
Intervening Plaintiff-Appellant,

AND

NEW JERSEY TURNPIKE AUTHORITY,
Intervening Plaintiff-Appellant,

v.

MORTON SALT COMPANY, AN ILLINOIS CORP., ET AL.,
Defendants-Appellees.

ON APPEALS FROM INTERLOCUTORY ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued October 17, 1967

Before HASTIE, FREEDMAN and SEITZ, *Circuit Judges.*

OPINION OF THE COURT

(Filed December 8, 1967)

SEITZ, *Circuit Judge.*

On June 28, 1965, the State of New Jersey instituted in the district court a private antitrust class action against seven corporations seeking treble damages and other appropriate relief because of their alleged violations of Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1 and 2). Several parties were permitted to intervene as plaintiffs. The district court thereafter granted the partial summary judgment motions of certain defendants based on the applicable statute of limitations.[1] Plaintiffs were granted leave to appeal those judgments and this is the decision thereon.

On July 11, 1961, the United States of America instituted a civil antitrust action in the Federal District Court of Minnesota (hereafter "Minnesota case"). Only one of the appellees here, International Salt Company ("International"), was a named defendant therein. The defendants in the Minnesota action were charged with a continuing combination and conspiracy to restrain trade in interstate commerce in rock salt in violation of Section 1 of the Sherman Act and to fix prices and to submit collusive bids to governmental agencies and corporations in connection with the sale of rock salt. A consent decree was entered against International on November 4, 1963. On November 24, 1964, judgments on the merits were entered in that action against other defendants, including defendants in this case who are not appellees. Those judgments were affirmed by the Supreme Court of the United States on October 25, 1965. Morton Salt Company v. The United States, 382 U. S. 44 (1965).

In 1966, the present appellees, International, Winans Carter Corp., Winans Reliance Corp., C. G. Winans Co., Chas. Schaefer Sons, Inc., National Oil & Supply Co., and Cayuga Rock Salt Company, successfully moved for partial summary judgment in this action in the district court

1. Claims accruing more than four years prior to the filing of the complaint are barred.

on the basis of the statute of limitations (15 U. S. C. § 15b), which provides that any action to enforce a claim of the present type is barred unless commenced within four years after the cause of action accrued.

With respect to the appellees other than International the district court concluded that the tolling statute, 15 U. S. C. § 16(b), had no application to them because they were not named as defendants or conspirators in the Government's Minnesota action. The appellants challenge the correctness of that interpretation. In reaching its conclusion that the statute applied only to named parties to the Government proceedings, the district court relied upon a decision of the New Jersey district court to that effect incorporated in an order in the case of New Jersey Wood Finishing Co. v. Minnesota Mining & Manufacturing. The order was apparently not appealed. In the present case the district court felt that it should adhere to the prior ruling in its district. However, it also relied upon cases elsewhere to the same effect.

We turn to the tolling statute. Section 16(b) provides:

> "(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not incuding an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

It is clear from the undisputed facts that if the quoted tolling provision was applicable to all the appellees, the summary judgments were erroneously entered here. We say this because § 16(b) tolls the statute during the pendency of Government proceedings and for one year thereafter. This action was, of course, commenced even before the termination of the Minnesota case. We address ourselves then to the question as to whether the statute of limitations was tolled as to such appellees.

We note immediately that Section 16(b) does not contain any language limiting its application on the basis of the identity of the defendants in the Government's antitrust action. Rather it is directed, to the extent indicated, to the preservation of "every private right of action," against the operation of the statute of limitations. And so Section 16(b) does not explicitly limit its operative effect to named parties or conspirators. That the absence of circumscribing language may have resulted from a deliberate Congressional intent is indicated by contrasting Section 16(b) with Section 16(a).[2] Section 16(a), dealing with the use of judgments or decrees obtained by the Government, explicitly limits their use to the defendants against whom they are obtained. We recognize that due process requires that Section 16(a) operate only against parties. But we think the language also suggests that had Congress intended to similarly limit the operation of Section 16(b), it had before it language appropriate to that end.

In pursuit of the proper interpretation of the tolling statute, we turn next to an examination of the Congres-

---

2. "(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title."

sional purpose behind the enactment of the statute authorizing private antitrust actions. See Burnett v. N. Y. Central Railroad Co., 380 U. S. 424 (1965). In this way we gain a "feel" for the appropriate approach to the problem of construing the tolling statute. Of course, limitation statutes reflect the view that society as well as potential defendants have an interest in repose from litigation. But that factor may be outweighed when the implementation of some important Congressional purpose is involved. We think such a purpose is particularly apparent here. As the United States Supreme Court said in Minnesota Mining v. New Jersey Wood Finishing Co., 381 U. S. 311, (1965), when considering this very section, Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws. See also Leh v. General Petroleum Corp., 382 U. S. 54 (1965); and see Bruce's Juices v. American Can Co., 330 U. S. 743 (1947).

The Congressional history, as reflected in the Minnesota Mining case, gives further support to the view that the tolling provision was enacted for the benefit of private parties who were injured. This factor plus Congressional policy suggest most strongly that the tolling provision, if of doubtful meaning, should be interpreted in a way which will permit a determination on their merits of private claims in this area.

Certainly a purpose behind the tolling provision was to afford the private litigant, as against defendants in a Government action, the benefit under restricted conditions of a judgment or decree obtained by the Government. But Leh and Minnesota Mining make it clear that at least an equally important purpose behind the enactment of Section 16(b) was to permit private claimants to obtain the benefit of the evidence and legal rulings involved in the Government's action. If the tolling provision is not for the benefit of private individuals who have been damaged by the activities of entities which are not named in the Government

action, that Congressional purpose will be in part frustrated. It could well mean that causes of action against purely private defendants would be barred even before the Government's action had progressed to the point where a legal or evidentiary basis for drawing a complaint against others could be established. We take notice that by their nature the processing of antitrust cases often takes years.

We think the following language from Leh, at 63-64 of the United States Reports, makes clear that 16(b) is not limited to named defendants in the Government's action:

> "* * * so here we cannot conclude that a private claimant may invoke § 5(b)[16(b)] only if the conspiracy of which he complains has the same breadth and scope in time and participants as the conspiracy described in the government action on which he relies. * * *"
>
> "* * * In suits of this kind, the absence of complete identity of defendants may be explained on several grounds unrelated to the question of whether the private claimant's suit is based on matters of which the Government complained."
>
> "* * * Or the private plaintiff may prefer to limit his suit to the defendants named by the Government whose activities contributed most directly to the injury of which he complains. On the other hand, some of the conspirators whose activities injured the private claimant may have been too low in the conspiracy to be selected as named defendants or co-conspirators in the Government's necessarily broader net."

But the appellees who were not named in the Minnesota case argue that it would be unfair to apply the tolling statute to them. They say that parties in their position might not even know of the Government's action. They point out that the lapse of time without notice may prejudice their ability to defend a later private antitrust action.

because they may have destroyed their records. There is a certain appeal to this argument. However, there are important ameliorative considerations. The Government decree or judgment cannot be used against them. Moreover, the tolling statute, by its provisions, will only apply if there is a substantial identity between the matters alleged in the Government's action and those alleged in the private action. Leh v. General Petroleum Corp., above. Thus, while it is true that by virtue of the operation of the tolling statute there may be a certain staleness to the claims, it is also true that the "substantial identity" requirement of the statute gives some assurance that the defendant in the private litigation who is not named in the Government action may reasonably be expected to have an awareness of the Government proceedings. Otherwise the private plaintiff probably will not be able to comply with the requirement that there be a "substantial identity" between the actions. On such a premise, and in such a context, it may fairly be said that the position of a purely private defendant is substantially the same as that of a defendant in the Government action, as to whom the tolling provision is admittedly applicable.

We conclude that Section 16(b) of the statute applies to these defendant-appellees even though they were not defendants in the Government action. See State of Michigan v. Morton Salt, 259 F. Supp. 35 (D. C. Minn. 1966) where the District Court of Minnesota held that Section 16(b) applied to parties who were not named defendants in the Government action.[3]

We next consider the contention of the appellee, International, that the tolling of the statute of limitations ceased when the consent decree was entered against it, even though

3. Although the Morton Salt case was appealed, the particular issues here decided were not among the matters raised by the appeal. See Hardy Salt Co. v. State of Illinois, 377 F.2d 768 (8th Cir., 1967); cert. denied October 23, 1967, 36 Law Week 3168. See also State of Vermont v. Cayuga Rock Salt Co., decided Oct. 17, 1967, appeal pending in the Court of Appeals for the First Circuit, where the Maine district court followed the Minnesota district court's opinion as to the applicability of 16(b) to parties who were not defendants in the Government action.

the action continued against the other defendants. The district court so held in reliance upon an earlier New Jersey District Court opinion to that effect in Gordon v. Loew's, Inc., 147 F. Supp. 398 (1956). We should add that that judgment was affirmed by this court on appeal, but on different grounds. See 247 F.2d 451 (3rd Cir. 1957). The district court also relied upon the leading case of Sun Theatre Corp. v. R. K. O., 213 F.2d 284 (7th Cir. 1954), which reached the same conclusion. We conclude that Gordon v. Loew's, Inc., above, and the line of cases of which Sun Theatre case is representative, were based upon an interpretation of Section 16 which was destroyed by the quoted analysis made by the United States Supreme Court in the Leh case. The Minnesota Mining opinion also supports our evaluation of the statute.

Much of the reasoning set forth in support of our conclusion with respect to the applicability of the tolling provision to the purely private defendants is also applicable to International in its "consent decree" status in the Government action. Additionally, if the tolling provision ceased to apply to a party in International's position, such a litigant could probably thereby frustrate to some extent the statutory scheme by perhaps depriving private litigants of its assumed benefits. It could do this by agreeing to the entry of a consent judgment before any testimony was adduced. In such a situation the consent decree could not even be used against it in a private action. In addition, the potential private litigants would be faced with the possibility of having to commence suit before testimony was taken or legal principles established which might be of benefit to them.

It is also noteworthy that a named defendant in a Government action has less ground for complaint that the staleness of the claim may work to its prejudice than does a purely private defendant. The Government defendant is on explicit notice of the Government's claim and can take action to preserve its evidence. Finally, our conclusion

does not particularly discourage the settlement of Government litigation. We say this because Section 16(a), does not permit the use in private litigation of consent judgments or decrees obtained in Government actions if they are entered before testimony is taken. And, of course, they are only usable against parties to the Government action.

We therefore conclude that Section 16(b) tolled the statute as against International until the Government's Minnesota case was completed even though a consent decree was entered against International several years earlier. See State of Michigan v. Morton Salt, above.

In view of our decision we do not reach other issues raised by the parties.

The judgments of the district court will be reversed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX C.

Correspondence on Consent-Decree Procedures Between Assistant Attorney General Donald F. Turner and Representative Emanuel Celler (D-NY)

March 2, 1967

Honorable Donald F. Turner
Assistant Attorney General
Antitrust Division
Department of Justice
Washington, D. C.

Dear Mr. Turner:

In its February 27, 1967 decision in the *El Paso* case (*Cascade Natural Gas Corp. v. El Paso Natural Gas Co., et al.*, and related cases), the Supreme Court underscored a deficiency in the procedures that are currently utilized by the Department of Justice in its antitrust consent decree program.

As you know, in the 85th Congress, the House Antitrust Subcommittee conducted an intensive investigation into the antitrust consent decree program of the Department of Justice. In its report, issued January 30, 1959, the Subcommittee, among other changes, recommended that the Department of Justice adopt procedures that would facilitate intervention by private parties in litigation over consent remedies in antitrust cases. The report of the Antitrust Subcommittee stated:

> "Revision of consent decree procedures of the Department of Justice, as the Committee recommends, should provide notice to the public of the terms of the consent decree, and establish a waiting period after there has

been agreement between the Government and the defendant. During the waiting period, private parties, who may be affected by the terms of the decree, *should be given an opportunity to intervene in the Government's case* in order to present their objections to the court for its consideration.

"When the Department of Justice presents a consent decree to the court for its approval, it should be accompanied by a statement that sets forth the facts involved, the defendant's position, the meaning of the provisions used in the decree, and the reasons that form the basis for the Department's acceptance of the particular compromise. The necessity to make such a statement should go far to insure against arbitrary action in the consent disposition of antitrust litigation." (emphasis supplied)

In view of the Supreme Court's positive affirmance in the *El Paso* case, that an applicant may intervene as of right when his property interests are not adequately represented, I believe it would be appropriate for the Antitrust Division to consider, at this time, revision of its Consent Judgment Policy, as promulgated in Order 246-61, June 21, 1961, so as to give effect to the above recommendations of the House Antitrust Subcommittee. "Incorporation of these recommendations in the Department of Justice Consent Judgment Policy would go far to minimize the settlement procedures that led to the Supreme Court's criticism in the *El Paso* case.

Sincerely yours,

.....

Emanuel Celler

Chairman"

March 17, 1967

Honorable Emanuel Celler
Chairman
Committee on the Judiciary
House of Representatives
Washington, D. C.

Dear Mr. Chairman:

This is in response to your letter of March 2, suggesting that in light of the *El Paso* decision the Antitrust Division should revise its consent judgment policy (1) by acquiescing in formal intervention by third parties in Government civil cases in order to permit them to present objections to Government negotiated decrees; and (2) by filing a statement with every consent decree, setting forth among other things the facts and "the reasons that formed the basis for the Department's acceptance of the particular compromise."

Before commenting more directly on these proposals, I would like to review the historical background, the reasons which lead to the adoption of the Consent Judgment Policy promulgated on June 21, 1961, and the reasons why we have thought it appropriate to continue to abide by that policy. The adoption of the policy was attributable in large part to the report of your Subcommittee dated January 30, 1959. As noted in your letter, the report recommended revision of the consent decree procedures in order to provide a waiting period after public notice in order that possible objections to a particular consent decree could be publicly aired. The principal purpose of this recommendation, as I understand it, was to insure that the Government would not enter into inappropriate decrees through lack of awareness of important factual considerations or through serious miscalculation of what would be an

appropriate decree in the particular circumstances involved. Similarly, the recommendation that the Department file a detailed statement with each consent decree was presumably intended to make sure that the Antitrust Division did not enter into consent decrees casually but only after a careful review of all the relevant considerations.

I completely agree with the goals just described, and I believe that the revision of procedures instituted in 1961 has enabled them to be substantially achieved. As you know, when the Government reaches agreement with the antitrust defendant on a consent judgment, the proposed judgment is filed in court with a stipulation which gives the Government an unqualified right to withdraw its consent at any time within 30 days.* At the time when the stipulation and proposed judgment are filed, it is our regular procedure to issue a press release relating to the proposed settlement. The fact that the Government has entered into a consent decree, and the information made available in the press release, is ordinarily given wide circulation not only in newspapers but in antitrust professional trade journals. The information is customarily given particular attention in the trade press serving the industry involved. In addition, we try to follow the practice of sending proposed judgments to know complainants once the proposed judgment has been filed with the court so that their views can be given to us within the 30-day waiting period. Even before a consent decree is agreed upon, interested parties have often communicated their views to the Antitrust Division on issues of relief. Where we have thought it appropriate, we solicited the views of competitors or other affected

* On very rare occasions when circumstances appeared to require it, and then only with personal approval by the Attorney General, the Government has filed a decree without a 30-day waiting period.

parties on the type and nature of relief they deem to be desirable; in some cases, such views have been solicited in the investigatory phase of the case, that is, before a complaint has even been filed. In sum, I believe that affected parties have had ample opportunity to make their views known to us before final adoption of a proposed consent judgment by a district court. Since 1961, when our procedures were revised, there have been several instances in which the 30-day waiting period has been extended in order for us to investigate information brought to our attention or to seek to revise negotiated decrees to take care of problems raised with us by interested private parties. The *Blue Chip Stamp* case, which is still not finally resolved, is the most recent and perhaps the most striking example.

In addition, while we have regularly opposed efforts by private parties to intervene formally in proceedings on proposed decrees, we have regularly acquiesced when private parties have endeavored to file statements or briefs with the district court or have requested the opportunity for oral argument to the court, both of which have become more and more common.

In my opinion, the Antitrust Division's consent decree procedures have clearly created adequate opportunity for objections to be raised, both privately to us or publicly to the courts or otherwise. They have substantially eliminated the danger that the Government would improvidently settle an antitrust case because of incomplete knowledge of the facts or inadequate appreciation of defects in proposed remedies. And I can personally testify that they have compelled the Division to consider carefully all relevant considerations before agreeing to a particular decree. The revised procedures, of course, have not maximized the opportunities for third parties to upset a decree negotiated between the Government and defendants, as our acqui-

escence in formal intervention by such third parties would do. Our procedures have not maximized, as formal intervention would, the opportunities for third parties to impress upon the courts policy conclusions different from what the Division itself has made. But in my view, the case for so broadening the opportunities for third parties to alter the Government's antitrust-enforcement policies is not a persuasive one.

I should like to restate the reasons. In the first place, as you know, use of the consent decree has greatly magnified the scope of antitrust enforcement that can be carried on with any given amount of enforcement resources. Approximately 70% of our civil cases terminate in consent decrees. Consent decrees are negotiated at various stages. On rare occasions they are negotiated in advance of the filing of a complaint; on some occasions agreement is not reached until shortly before trial; and in some other cases, the decree is not negotiated until after trial on the substantive issue of liability. In most instances, decrees are negotiated at some time after the filing of the complaint but well before the Government has fully prepared its case for trial. But in any event, the negotiation of the decree frees enforcement resources for use elsewhere, and the over-all saving from negotiated settlements is enormous.

It is of course to be expected that in many instances a consent decree will fall short of what might possibly be obtained after full litigation on all issues concerning liability and appropriate relief. One cannot expect defendants regularly to agree to the worst that could happen if they lost a fully litigated case on all fronts. Nevertheless, even in those decrees where the Government has settled for less than what might ultimately be obtaned, there is always the offsetting advantage of obtaining relief at once rather than three, four or five years later, and in many cases, the

Government succeeds in obtaining consent to a decree as good as, or better than, what could be probably obtained from full litigation.

The factors which the Government takes into account in considering whether to agree to a particular decree may be briefly set forth. In addition to the scope and effectiveness of the relief that the decree would provide, they include the strength of the case on the law and the facts; the amount of resources that would be tied up in full preparation for trial and in subsequent legal proceedings; the desirability or necessity of obtaining significant relief rapidly; the value of any added increment of relief that full litigation might produce as compared to the value of the alternative enforcement efforts that could be carried out instead; and the effect that consent to a particular decree might have on other cases, present and future, that are or might be arguably similar. These factors obviously cannot be precisely measured; they rarely all point in the same direction. Striking a balance is a matter for judgment in all instances, and the judgment is often one on which not only one but many reasonable men might differ among themselves.

There is unquestioned value, as I have said, in procedures which enable those who differ with our judgment on any particular case to make their views known—privately to us, or publicly to a court. But to let private parties intervene as of right in opposition to a proposed consent decree would threaten to reduce sharply the number of cases that could be disposed of in this way, and in my opinion, would serve no useful purpose because it would have no promise whatsoever of producing more appropriate results. It should be noted at the outset that no intervenor can force a decree on an unwilling party-defendant.

Should the party-defendant decline to go beyond what he has agreed to do in negotiations with the Government, the intervenor can do no more than force on the Government the choice between dismissal of the case or proceeding to full litigation. And the very process of formal intervention, if that is held to carry with it the full rights of the usual litigant to present evidence and to appeal, would threaten to eliminate one of the major motivating factors that leads both the Government and defendants to attempt to work out an appropriate decree, since intervention would force on the Government and defendants at least some of the burdens of litigation that both, for diverse reasons, have sought to avoid.

Moreover, private intervenors are intervening to serve their own particular private interests. In any Government antitrust action involving conduct for which there may be private treble damage liability there will be some potential private plaintiffs who want no consent decree at all; they wish the Government to litigate and obtain an adjudication on the issue of liability in order to take advantage of Section 5 of the Clayton Act. In almost all antitrust cases, there are some private parties who do not want effective antitrust relief because it may damage their own private interests. There are, for example, many private interests who may be moderately or even seriously damaged by an effective divestiture decree in a Section 7 case; distributors, for example, may lose their distribution rights when the divested company falls into the hands of new owners. Finally, there are some would-be intervenors who want the Government to get more in the way of relief than the Government has agreed to accept, but even in those instances, the parties are concerned with only their own particular situation; they are not concerned with, and indeed

are in no position to evaluate, the place which their case has in the overall antitrust enforcement program.

Where the Government has concluded that the added amount of relief which might theoretically be obtained would involve protracted litigation and use of enforcement resources which could be put to much better use elsewhere, the private intervenor would rarely if ever be in a position to second-guess that judgment. Nor would the court to whom such an issue would be put. Indeed that judgment bears all of the hallmarks of a nonjusticiable issue. Thus, it seems to me that decisions of this kind are properly left to the enforcing agency, subject to the checks against mistake of fact, miscalculation of consequences of plain sloppiness that our existing consent judgment procedures provide, and subject of course to the additional check of continuous Executive and Congressional scrutiny.

This brings me to the decision of the Supreme Court in the *El Paso* case. It would of course be wholly inappropriate for me to re-argue the merits of that case. The decision of the Supreme Court must be respected. However, I can say that I do not read that decision as necessarily holding or suggesting that the intervention granted in that case is a precedent for intervention in consent decree proceedings generally. Without going into a full analysis, I note that the Court stressed the fact that *El Paso* involved a Supreme Court mandate which allegedly had not been honored, and I further note that the *El Paso* case on its facts made effective divestiture of much greater concern to those who attempted to intervene than customers ordinarily have in, say, a typical Section 7 case. Consequently, in view of the considerations I have outlined above, I believe it appropriate for us, in the usual situation, to continue to ouppose attempted formal intervention in consent decree proceedings in Government civil antitrust cases.

The second proposal which you cited from the 1959 report of the Committee was that the Department of Justice accompany the filing of a consent decree with

> "a statement that sets forth the facts involved, defendant's position, the meaning of the provisions used in the decree, and the reasons that formed the basis for the Department's acceptance of the particular compromise."

As I have indicated, the Department commonly issues a press release containing at least some information about the proposed decree. The amount of information supplied varies a great deal from case to case. I believe that the proposal to provide a more detailed statement merits serious consideration on our part. It may well be we could and should supply more information than we have been accustomed to do, particularly in explaining the purposes of the decree and the expected impact of the relief obtained.

We deeply appreciate your continued interest in effective enforcement of the antitrust laws.

Sincerely yours,

DONALD F. TURNER
Assistant Attorney General
Antitrust Division

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967.

No. 1346

CAYUGA ROCK SALT COMPANY, CHAS. SCHAEFER SONS, INC., WINANS CARTER CORP., WINANS RELIANCE CORP. and C. G. WINANS COMPANY,

Petitioners,

v.

STATE OF NEW JERSEY, on Behalf of Itself and All Others Similarly Situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Of Counsel:
FOX, ROTHSCHILD, O'BRIEN & FRANKEL.

ORLANDO & CUMMINS.

ISRAEL PACKEL,
DANIEL LOWENTHAL,
DONALD BROWN,
E. GERALD DONNELLY, JR.,
1401 Walnut Street,
Philadelphia, Pa. 19102

GEORGE H. HOHWEILER,
SAMUEL P. ORLANDO,
1007 Wilson Building,
Camden, New Jersey,
Attorneys for Petitioner, Cayuga Rock Salt Company.

WILENTZ, GOLDMAN & SPITZER,
252 Madison Avenue,
Perth Amboy, New Jersey,
Attorneys for Petitioner, Chas. Schaefer Sons, Inc.

LOWENSTEIN & SPICER,
744 Broad Street,
Newark, New Jersey,
Attorneys for Petitioners, Winans Carter Corp., Winans Reliance Corp. and C. G. Winans Company.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

INDEX.

	Page
Reports of the Opinions of the Courts Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Basis for Federal Jurisdiction	3
Statement of the Case	4
Reasons for Allowance of the Writ	7
1. The Conflict With Other Circuits	7
2. Need for Judicial Clarification to Effectuate Congressional Policy	9
Conclusion	12

TABLE OF CASES CITED.

	Page
Armour & Co. v. Wantock, 323 U. S. 126 (1944)	9
Charles Rubenstein, Inc. v. Columbia Pictures Corp., 154 F. Supp. 216 (D. Minn. 1957)	7
Charles Rubenstein, Inc. v. Columbia Pictures Corp., 176 F. Supp. 527 (D. Minn. 1959), aff'd 289 F. 2d 418 (8th Cir. 1961)	7
Christensen v. Paramount Pictures, Inc., 95 F. Supp. 446 (D. Utah 1950)	8, 10
Court Degraw Theatre, Inc. v. Loew's Inc., 172 F. Supp. 198 (E. D. N. Y. 1959)	7
Electric Theater Co. v. Twentieth Century-Fox Film Corp., 113 F. Supp. 937 (W. D. Mo. 1953)	8
Hardy Salt Co. v. State of Illinois, 377 F. 2d 768, (8th Cir. 1967), cert. denied, 389 U. S. 912 (1967)	8
Leh v. General Petroleum Corp., 382 U. S. 54 (1965)	8, 9
Leonia Amusement Corp. v. Loew's Inc., 117 F. Supp. 747 (S. D. N. Y. 1953)	7, 8
Levy v. Paramount Pictures, Inc., 104 F. Supp. 787 (N. D. Cal. 1952)	8
Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U. S. 311 (1965)	8, 9
Momand v. Universal Film Exchanges, 172 F. 2d 37 (1st Cir. 1948), cert. denied, 336 U. S. 967 (1949)	7
Morton Salt Company v. U. S., 382 U. S. 44 (1965)	6
Samuel Goldwyn Productions, Inc. v. Fox West Coast Theatres Corp., 146 F. Supp. 905 (N. D. Cal. 1956)	7
State of Michigan v. Morton Salt Co., 259 F. Supp. 35 (D. Minn. 1966)	8
Sun Theatre Corp. v. RKO Radio Pictures, Inc., 213 F. 2d 284 (7th Cir. 1954)	7
United States v. Morton Salt Company, 1964 CCH Trade Cases ¶ 71,304	5

STATUTES AND REPORTS CITED.

	Page
Sherman Act, Sections 1 and 2, July 2, 1890, c. 647, 26 Stat. 207, 210, 15 U. S. C. §§ 1, 2	3
Act of June 25, 1948, 28 U. S. C. § 1254	2
Clayton Act, § 4(b), c. 283, § 1, 69 Stat. 283, 15 U. S. C. § 15(b)	2
Clayton Act, § 5(b), c. 283, § 2, 69 Stat. 283, 15 U. S. C. § 16(b)	2
House Committee Report (H. R. Rep. No. 422, 84th Cong. 1st Sess. 9 (1955))	10
S. Rep. No. 619, 84th Cong. 1st Sess. 6 (1955)	10

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1967.

No.

CAYUGA ROCK SALT COMPANY, CHAS. SCHAEFER SONS, INC., WINANS CARTER CORP., WINANS RELIANCE CORP. AND C. G. WINANS COMPANY,
Petitioners

v.

STATE OF NEW JERSEY, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Cayuga Rock Salt Company, Chas. Schaefer Sons, Inc., Winans Carter Corp., Winans Reliance Corp., and C. G. Winans Company, Petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on January 22, 1968.

REPORTS OF THE OPINIONS OF THE COURTS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit is reported at 387 F. 2d 94 (3d Cir. 1967). It is appended to this petition at pages A-1 to A-9. The opinion of the District Court for the District of New Jersey is unreported and is appended to this petition at pages A-10 to A-55.

JURISDICTION.

The Judgment and Opinion of the United States Court of Appeals for the Third Circuit reversing the judgments of the United States District Court for the District of New Jersey were filed on December 8, 1967. Rehearing was denied on January 22, 1968.

The Jurisdiction of this Court is invoked pursuant to the provisions of the Act of June 25, 1948, 28 U. S. C. § 1254.

QUESTION PRESENTED.

May the tolling provision of Section 5 (b) of the Clayton Act be invoked against defendants to bar the defense of the Statute of Limitations where such defendants were neither named as defendants nor as co-conspirators in the prior government antitrust proceeding against other sellers found to be engaged in a limited regional conspiracy in markets where the present defendants do not engage in business?

STATUTES INVOLVED.

The statutes involved are § 4(b) of the Clayton Act, c. 283, § 1, 69 Stat. 283, 15 U. S. C. § 15(b):

> "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revised by said sections."

and § 5(b) of the Clayton Act, c. 283, § 2, 69 Stat. 283, 15 U. S. C. § 16(b):

"Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including any action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension of within four years after the cause of action accrued."

BASIS FOR FEDERAL JURISDICTION.

Federal jurisdiction over this case is based upon the Sherman Act, Sections 1 and 2, July 2, 1890, c. 647, 26 Stat. 207, 210, 15 U. S. C. §§ 1, 2.

STATEMENT OF THE CASE.

Petitioners seek review of the judgment of the United States Court of Appeals for the Third Circuit which denied them the defense of the four year statute of limitations of the Clayton Act because of the pendency of a prior government action with which petitioners were not even remotely connected.

The first complaint in this case was filed on June 28, 1965 by the State of New Jersey on its own behalf and as a representative of an alleged class. This complaint, which was never served upon instructions from plaintiffs' counsel, averred violations of the Sherman Act and was brought against petitioner, Cayuga Rock Salt Company, and against three other producers of rock salt: Morton Salt Company, International Salt Company and Diamond Crystal Salt Company.[1] The latter three salt producers had been named as parties in prior government antitrust proceedings in Minneapolis, Minnesota, but the petitioner, Cayuga Rock Salt Company, was not named nor in any way involved in that prior proceeding (189a).

An amended complaint in this case was subsequently filed on October 25, 1965, adding petitioners, Charles Schaefer Sons, Inc., Winans Carter Corp. and Winans Reliance Corp., local distributors of rock salt in New Jersey, as defendants in addition to those named in the original Complaint (21a-27a). Like petitioner, Cayuga Rock Salt Company, these latter petitioners were neither named as defendants or co-conspirators, nor in any way involved in the Minnesota proceedings brought by the government.

1. Local Philadelphia distributors of rock salt, Salt Service Incorporated and Pioneer Salt Company were named as defendants, but subsequently were dropped as parties upon the filing of the amended complaint on October 25, 1965.

The first government action was a criminal indictment returned against the other three salt producers in the District of Minnesota (No. 4-61 Cr. 65) on June 28, 1961. Thereafter, a companion civil proceeding was filed by the United States on July 11, 1961 (No. 4-61 Civ. 162) (143a). The jury trial in the criminal case commenced May 2, 1962 against Morton, Diamond Crystal and International Salt Companies and was concluded on June 7, 1962, resulting in acquittals for the three salt producers. A judgment was entered in the civil suit against Morton Salt Company and Diamond Crystal Salt Company[2] on November 24, 1963, following trial without jury. *United States v. Morton Salt Company,* 1964 CCH Trade Cases ¶ 71,304.

The record and the exhibits in both the criminal and civil actions in Minneapolis make no mention of any of the petitioners. No officer or representative of any of the petitioners appeared as a witness in those proceedings. None of the petitioners received notice of the pendency of the government proceedings. The opinion of the Court in the civil action makes no mention of any of the petitioners. *United States v. Morton Salt Company, supra.* No finding of a national conspiracy was made in the government civil case in which only a limited six state midwest regional conspiracy was found to exist. *United States v. Morton Salt Company, supra.* None of the petitioners is engaged in business in the midwest (29a, 31a, 42a). Subsequently, the judgment as to Morton Salt Company and Diamond Crystal Salt Company in the Government civil action was affirmed by this Court on October 25, 1965. *Morton Salt Company v. U. S.,* 382 U. S. 44 (1965).

---

2. International Salt Company did not litigate the civil action, having stipulated to a Consent Decree which was filed on September 20, 1963 and which was signed by Judge Nordbye on November 4, 1963.

In the instant case, the District Court granted petitioners' motions for partial summary judgments by limiting the plaintiffs' claims for damages under the federal antitrust laws to the four year period commencing June 28, 1961 through June 28, 1965, holding that the statute of limitations protected petitioners who were not involved in the prior government action against middle western producers and distributors.

Upon interlocutory appeal, the United States Court of Appeals for the Third Circuit acknowledged the unfairness of tolling the statute of limitations as to the petitioners and found that petitioners' argument has a "certain appeal." Nevertheless, the Court rejected the District Court's position which was supported by overwhelming precedent, and reversed the partial summary judgments in favor of petitioners solely upon its interpretation of Congressional policy. It is this judgment of the Court of Appeals for the Third Circuit that is sought to be reviewed by a Writ of Certiorari.

REASONS FOR ALLOWANCE OF THE WRIT.

The decision of the United States Court of Appeals for the Third Circuit in the present case has determined a crucial and far reaching issue in the area of private antitrust law in direct conflict with decisions of the United States Court of Appeals for the First Circuit and the United States Court of Appeals for the Seventh Circuit. The present decision also conflicts with numerous District Court decisions, the rule of which has been expressly approved in the Congressional history of the tolling provision presently under consideration. The present decision was stated to be based upon broad policy considerations enunciated in two recent decisions of this Court, which dealt with inapposite factual situations, and upon the unappealed portion of a single District Court opinion.

1. The Conflict With Other Circuits.

Both *Sun Theatre Corp. v. RKO Radio Pictures, Inc.*, 213 F. 2d 284 (7th Cir. 1954) and *Momand v. Universal Film Exchanges*, 172 F. 2d 37 (1st Cir. 1948), *cert. denied*, 336 U. S. 967 (1949), squarely held that the statute suspending the running of limitations during the pendency of a government action to enforce the antitrust laws has no application to one not a party to such government action. Similar holdings appear in *Charles Rubenstein, Inc. v. Columbia Pictures Corp.*, 176 F. Supp. 527 (D. Minn. 1959), aff'd 289 F. 2d 418 (8th Cir. 1961); *Court Degraw Theatre, Inc. v. Loew's Inc.*, 172 F. Supp. 198 (E. D. N. Y. 1959); *Charles Rubenstein, Inc. v. Columbia Pictures Corp.*, 154 F. Supp. 216 (D. Minn. 1957); *Samuel Goldwyn Productions, Inc. v. Fox West Coast Theatres Corp.*, 146 F. Supp. 905 (N. D. Cal. 1956); *Leonia Amusement Corp. v. Loew's Inc.*, 117 F.

Supp. 747 (S. D. N. Y. 1953); *Electric Theater Co. v. Twentieth Century-Fox Film Corp.*, 113 F. Supp. 937 (W. D. Mo. 1953); *Levy v. Paramount Pictures, Inc.*, 104 F. Supp. 787 (N. D. Cal. 1952); *Christensen v. Paramount Pictures, Inc.*, 95 F. Supp. 446 (D. Utah 1950). However, the Court of Appeals for the Third Circuit in the instant case has determined that these decisions are no longer authoritative because of certain language in this Court's recent opinions in *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U. S. 311 (1965) and *Leh v. General Petroleum Corp.*, 382 U. S. 54 (1965), and has instead chosen to rely upon the isolated holding in *State of Michigan v. Morton Salt Co.*, 259 F. Supp. 35 (D. Minn. 1966).[3]

The Court of Appeals' reliance upon certain statements of this Court in *Minnesota Mining* and *Leh, supra,* is completely unwarranted because those statements must be read in the light of the fact that both cases involved defendants who had been named as parties in a government action. Neither case dealt with the applicability of the tolling provisions to non-government defendants as the present petitioners. In *Minnesota Mining, supra,* there was no tolling as to the Essex Wire Company which, like petitioners, was not a party to the government proceedings. This was specifically noted in the subsequent *Leh* opinion:

> "Essex was not a party to the interlocutory appeal in the private action *and no contention was made here that the differences in parties prevented tolling of limitations as to Minnesota Mining.*" (382 U. S. at 63) (Emphasis added.)

---

3. It is significant, however, that there were no defendants in the position of the present petitioners on appeal from that decision, so that the present issue was not raised in the Appellate Court. In fact, the Court of Appeals for the Seventh Circuit expressly limited its holding to named co-conspirators. See *Hardy Salt Co. v. State of Illinois*, 377 F. 2d 768, 775 (8th Cir. 1967), cert. denied, 389 U. S. 912 (1967).

Similarly, in the *Leh* case itself, the tolling provision was not applied by this Court to a non-government defendant (382 U. S. at 61):

> "The defendants were the same as those in the government proceeding, except that Shell Oil Company and the Conservation Committee of California Oil Producers were named as defendants in the government suit and were not defendants here, and Olympic Oil Company was named as a defendant here and was not a defendant in the government proceeding.[4]
>
> * * *

4. Olympic was dismissed from the case prior to the ruling on defendants' statute of limitations defense."
(Footnote by the Court)

As this Court so aptly noted in *Armour & Co. v. Wantock*, 323 U. S. 126, 133 (1944):

> "General expressions transposed to other facts are often misleading."

It is submitted that an issue of such grave importance to antitrust law should be finally settled by this Court, and that the scope of this Court's decisions in *Minnesota Mining* and *Leh*, in the context of the different circumstances presented by this case, should be expressly defined by allowing this petition for certiorari and ultimately resolving the applicability of the tolling provision of the Clayton Act.

2. Need for Judicial Clarification to Effectuate Congressional Policy.

The Court of Appeals relied heavily upon its own interpretation of Congressional history and the policy of implementing private antitrust litigation to gain a "feel" for the issue presented. However, the Court of Appeals

ignored explicit expressions of Congressional policy found in the history of the 1955 amendments to the tolling provision. The House Committee Report (H. R. Rep. No. 422, 84th Cong. 1st Sess. 9 (1955)) contained a detailed analysis of *Christiansen v. Paramount Pictures, Inc., supra,* where the Court refused to toll the Statute of Limitations with respect to a private treble damage defendant who was not a defendant in the government litigation. Similarly, the Report of the Senate Committee on the Judiciary stated that:

> "The Committee believes the provision of this bill [tolling provision] will tend to *shorten* the period over which private treble damage actions will extend by requiring that the plaintiff bring his suit within four years after it accrued or within one year after the Government's case has been concluded." (S. Rep. No. 619, 84th Cong. 1st Sess. 6 (1955).) (Emphasis added.)

The Committee also indicated that "it [did] not believe that undue prolongation of proceedings is conducive to effective and efficient enforcement of the antitrust laws." *Ibid.*

It is submitted that the decision of the Court of Appeals in this case not only is unsupported by the Legislative history upon which it purports to justify its result, but also enlarges the period which Congress expressly intended to shorten. For this reason alone, a writ of certiorari should be allowed by this Court to clarify an important point of antitrust law.

Finally, the Court of Appeals has acknowledged that there is some degree of unfairness in applying the tolling provisions to petitioners and that the claims raised against them may be stale. The record is clear that petitioners

were not named as defendants or co-conspirators in the government action; were not notified of the action; were not witnesses at any stage of the proceedings; and had no reason to prepare for the defense of this case. It is also undisputed that the government litigation resulted in a finding of only a limited six state conspiracy in the Midwest. But the Court of Appeals considers that petitioners are adequately protected since the tolling provisions will only be effective if it develops that there is a "substantial identity" between the government action and this case. However, the assumption by the Court of Appeals of the possibility of such a development subjects petitioners to a protracted trial on the merits to reach the issue of identity, requiring the proof and defense of stale claims.

Whether or not "substantial identity" is an appropriate test as to "parties" and "co-conspirators," it is clear that such test is inappropriate under the present circumstances where identity cannot be present in that the petitioners had no connection with the earlier action or any claims asserted therein.

CONCLUSION.

For all of the foregoing reasons, petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

Of Counsel:

FOX, ROTHSCHILD, O'BRIEN & FRANKEL,

ORLANDO & CUMMINS.

ISRAEL PACKEL,
DANIEL LOWENTHAL,
DONALD BROWN,
E. GERALD DONNELLY, JR.,

GEORGE H. HOHWEILER,
SAMUEL P. ORLANDO,
Attorneys for Petitioners, Cayuga Rock Salt Company.

WILENTZ, GOLDMAN & SPITZER,
Attorneys for Petitioner, Chas. Schaefer Sons, Inc.

LOWENSTEIN & SPICER,
Attorneys for Petitioners, Winans Carter Corp., Winans Reliance Corp. and C. G. Winans Company.

SUPREME COURT U. S.

FILED
APR 19 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967.

No. 1346

CAYUGA ROCK SALT COMPANY, CHAS. SCHAEFER SONS, INC., WINANS CARTER CORP., WINANS RELIANCE CORP. and C. G. WINANS COMPANY,
Petitioners,

v.

STATE OF NEW JERSEY, on Behalf of Itself and All Others Similarly Situated,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Of Counsel:
FOX, ROTHSCHILD, O'BRIEN & FRANKEL.

ORLANDO & CUMMINS.

ISRAEL PACKEL,
DANIEL LOWENTHAL,
DONALD BROWN,
E. GERALD DONNELLY, JR.,
1401 Walnut Street,
Philadelphia, Pa. 19102

GEORGE H. HOHWEILER,
SAMUEL P. ORLANDO,
1007 Wilson Building,
Camden, New Jersey,
Attorneys for Petitioner, Cayuga Rock Salt Company.

WILENTZ, GOLDMAN & SPITZER,
252 Madison Avenue,
Perth Amboy, New Jersey,
Attorneys for Petitioner, Chas. Schaefer Sons, Inc.

LOWENSTEIN & SPICER,
744 Broad Street,
Newark, New Jersey,
Attorneys for Petitioners, Winans Carter Corp., Winans Reliance Corp. and C. G. Winans Company.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711. Area Code 215

Index to Appendix

Opinion of the United States Court of Appeals for the Third Circuit A-1

Opinion of Lane, U.S.D.J. (September 19, 1966) A-11

Order Granting Motions for Partial Summary Judgment and Denying Motion for Leave to File Amended Complaint or Responsive Pleading A-47

Hearing of November 21, 1966 A-51

Order Granting Motions for Partial Summary Judgment and Denying Motion for Leave to File Amended Complaint or Responsive Pleading A-55

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 16397 16517
16398 16518
16399 16519

THE STATE OF NEW JERSEY, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

AND

COUNTY OF BERGEN, A BODY POLITIC AND CORPORATE OF THE STATE OF NEW JERSEY,
Intervening Plaintiff-Appellant,

AND

NEW JERSEY HIGHWAY AUTHORITY,
Intervening Plaintiff-Appellant,

AND

NEW JERSEY TURNPIKE AUTHORITY,
Intervening Plaintiff-Appellant,

v.

MORTON SALT COMPANY, AN ILLINOIS CORP., ET AL.,
Defendants-Appellees.

ON APPEALS FROM INTERLOCUTORY ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued October 17, 1967
Before HASTIE, FREEDMAN and SEITZ, *Circuit Judges.*

OPINION OF THE COURT
(Filed December 8, 1967)

SEITZ, *Circuit Judge.*

On June 28, 1965, the State of New Jersey instituted in the district court a private antitrust class action against seven corporations seeking treble damages and other appropriate relief because of their alleged violations of Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1 and 2). Several parties were permitted to intervene as plaintiffs. The district court thereafter granted the partial summary judgment motions of certain defendants based on the applicable statute of limitations.[1] Plaintiffs were granted leave to appeal those judgments and this is the decision thereon.

On July 11, 1961, the United States of America instituted a civil antitrust action in the Federal District Court of Minnesota (hereafter "Minnesota case"). Only one of the appellees here, International Salt Company ("International"), was a named defendant therein. The defendants in the Minnesota action were charged with a continuing combination and conspiracy to restrain trade in interstate commerce in rock salt in violation of Section 1 of the Sherman Act and to fix prices and to submit collusive bids to governmental agencies and corporations in connection with the sale of rock salt. A consent decree was entered against International on November 4, 1963. On November 24, 1964, judgments on the merits were entered in that action against other defendants, including defendants in this case who are not appellees. Those judgments were affirmed by the Supreme Court of the United States on October 25, 1965. Morton Salt Company v. The United States, 382 U. S. 44 (1965).

In 1966, the present appellees, International, Winans Carter Corp., Winans Reliance Corp., C. G. Winans Co., Chas. Schaefer Sons, Inc., National Oil & Supply Co., and Cayuga Rock Salt Company, successfully moved for partial summary judgment in this action in the district court

1. Claims accruing more than four years prior to the filing of the complaint are barred.

on the basis of the statute of limitations (15 U. S. C. § 15b), which provides that any action to enforce a claim of the present type is barred unless commenced within four years after the cause of action accrued.

With respect to the appellees other than International the district court concluded that the tolling statute, 15 U. S. C. § 16(b), had no application to them because they were not named as defendants or conspirators in the Government's Minnesota action. The appellants challenge the correctness of that interpretation. In reaching its conclusion that the statute applied only to named parties to the Government proceedings, the district court relied upon a decision of the New Jersey district court to that effect incorporated in an order in the case of New Jersey Wood Finishing Co. v. Minnesota Mining & Manufacturing. The order was apparently not appealed. In the present case the district court felt that it should adhere to the prior ruling in its district. However, it also relied upon cases elsewhere to the same effect.

We turn to the tolling statute. Section 16(b) provides:

> "(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not incuding an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

It is clear from the undisputed facts that if the quoted tolling provision was applicable to all the appellees, the summary judgments were erroneously entered here. We say this because § 16(b) tolls the statute during the pendency of Government proceedings and for one year thereafter. This action was, of course, commenced even before the termination of the Minnesota case. We address ourselves then to the question as to whether the statute of limitations was tolled as to such appellees.

We note immediately that Section 16(b) does not contain any language limiting its application on the basis of the identity of the defendants in the Government's antitrust action. Rather it is directed, to the extent indicated, to the preservation of "every private right of action," against the operation of the statute of limitations. And so Section 16(b) does not explicitly limit its operative effect to named parties or conspirators. That the absence of circumscribing language may have resulted from a deliberate Congressional intent is indicated by contrasting Section 16(b) with Section 16(a).[2] Section 16(a), dealing with the use of judgments or decrees obtained by the Government, explicitly limits their use to the defendants against whom they are obtained. We recognize that due process requires that Section 16(a) operate only against parties. But we think the language also suggests that had Congress intended to similarly limit the operation of Section 16(b), it had before it language appropriate to that end.

In pursuit of the proper interpretation of the tolling statute, we turn next to an examination of the Congres-

---

2. "(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title."

sional purpose behind the enactment of the statute authorizing private antitrust actions. See Burnett v. N. Y. Central Railroad Co., 380 U. S. 424 (1965). In this way we gain a "feel" for the appropriate approach to the problem of construing the tolling statute. Of course, limitation statutes reflect the view that society as well as potential defendants have an interest in repose from litigation. But that factor may be outweighed when the implementation of some important Congressional purpose is involved. We think such a purpose is particularly apparent here. As the United States Supreme Court said in Minnesota Mining v. New Jersey Wood Finishing Co., 381 U. S. 311, (1965), when considering this very section, Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws. See also Leh v. General Petroleum Corp., 382 U. S. 54 (1965); and see Bruce's Juices v. American Can Co., 330 U. S. 743 (1947).

The Congressional history, as reflected in the Minnesota Mining case, gives further support to the view that the tolling provision was enacted for the benefit of private parties who were injured. This factor plus Congressional policy suggest most strongly that the tolling provision, if of doubtful meaning, should be interpreted in a way which will permit a determination on their merits of private claims in this area.

Certainly a purpose behind the tolling provision was to afford the private litigant, as against defendants in a Government action, the benefit under restricted conditions of a judgment or decree obtained by the Government. But Leh and Minnesota Mining make it clear that at least an equally important purpose behind the enactment of Section 16(b) was to permit private claimants to obtain the benefit of the evidence and legal rulings involved in the Government's action. If the tolling provision is not for the benefit of private individuals who have been damaged by the activities of entities which are not named in the Government

action, that Congressional purpose will be in part frustrated. It could well mean that causes of action against purely private defendants would be barred even before the Government's action had progressed to the point where a legal or evidentiary basis for drawing a complaint against others could be established. We take notice that by their nature the processing of antitrust cases often takes years.

We think the following language from Leh, at 63-64 of the United States Reports, makes clear that 16(b) is not limited to named defendants in the Government's action:

> "* * * so here we cannot conclude that a private claimant may invoke § 5(b)[16(b)] only if the conspiracy of which he complains has the same breadth and scope in time and participants as the conspiracy described in the government action on which he relies. * * *"
>
> "* * * In suits of this kind, the absence of complete identity of defendants may be explained on several grounds unrelated to the question of whether the private claimant's suit is based on matters of which the Government complained."
>
> "* * * Or the private plaintiff may prefer to limit his suit to the defendants named by the Government whose activities contributed most directly to the injury of which he complains. On the other hand, some of the conspirators whose activities injured the private claimant may have been too low in the conspiracy to be selected as named defendants or co-conspirators in the Government's necessarily broader net."

But the appellees who were not named in the Minnesota case argue that it would be unfair to apply the tolling statute to them. They say that parties in their position might not even know of the Government's action. They point out that the lapse of time without notice may prejudice their ability to defend a later private antitrust action

because they may have destroyed their records. There is a certain appeal to this argument. However, there are important ameliorative considerations. The Government decree or judgment cannot be used against them. Moreover, the tolling statute, by its provisions, will only apply if there is a substantial identity between the matters alleged in the Government's action and those alleged in the private action. Leh v. General Petroleum Corp., above. Thus, while it is true that by virtue of the operation of the tolling statute there may be a certain staleness to the claims, it is also true that the "substantial identity" requirement of the statute gives some assurance that the defendant in the private litigation who is not named in the Government action may reasonably be expected to have an awareness of the Government proceedings. Otherwise the private plaintiff probably will not be able to comply with the requirement that there be a "substantial identity" between the actions. On such a premise, and in such a context, it may fairly be said that the position of a purely private defendant is substantially the same as that of a defendant in the Government action, as to whom the tolling provision is admittedly applicable.

We conclude that Section 16(b) of the statute applies to these defendant-appellees even though they were not defendants in the Government action. See State of Michigan v. Morton Salt, 259 F. Supp. 35 (D. C. Minn. 1966) where the District Court of Minnesota held that Section 16(b) applied to parties who were not named defendants in the Government action.[3]

We next consider the contention of the appellee, International, that the tolling of the statute of limitations ceased when the consent decree was entered against it, even though

3. Although the Morton Salt case was appealed, the particular issues here decided were not among the matters raised by the appeal. See Hardy Salt Co. v. State of Illinois, 377 F.2d 768 (8th Cir., 1967); cert. denied October 23, 1967, 36 Law Week 3168. See also State of Vermont v. Cayuga Rock Salt Co., decided Oct. 17, 1967, appeal pending in the Court of Appeals for the First Circuit, where the Maine district court followed the Minnesota district court's opinion as to the applicability of 16(b) to parties who were not defendants in the Government action.

the action continued against the other defendants. The district court so held in reliance upon an earlier New Jersey District Court opinion to that effect in Gordon v. Loew's, Inc., 147 F. Supp. 398 (1956). We should add that that judgment was affirmed by this court on appeal, but on different grounds. See 247 F.2d 451 (3rd Cir. 1957). The district court also relied upon the leading case of Sun Theatre Corp. v. R. K. O., 213 F.2d 284 (7th Cir. 1954), which reached the same conclusion. We conclude that Gordon v. Loew's, Inc., above, and the line of cases of which Sun Theatre case is representative, were based upon an interpretation of Section 16 which was destroyed by the quoted analysis made by the United States Supreme Court in the Leh case. The Minnesota Mining opinion also supports our evaluation of the statute.

Much of the reasoning set forth in support of our conclusion with respect to the applicability of the tolling provision to the purely private defendants is also applicable to International in its "consent decree" status in the Government action. Additionally, if the tolling provision ceased to apply to a party in International's position, such a litigant could probably thereby frustrate to some extent the statutory scheme by perhaps depriving private litigants of its assumed benefits. It could do this by agreeing to the entry of a consent judgment before any testimony was adduced. In such a situation the consent decree could not even be used against it in a private action. In addition, the potential private litigants would be faced with the possibility of having to commence suit before testimony was taken or legal principles established which might be of benefit to them.

It is also noteworthy that a named defendant in a Government action has less ground for complaint that the staleness of the claim may work to its prejudice than does a purely private defendant. The Government defendant is on explicit notice of the Government's claim and can take action to preserve its evidence. Finally, our conclusion

does not particularly discourage the settlement of Government litigation. We say this because Section 16(a), does not permit the use in private litigation of consent judgments or decrees obtained in Government actions if they are entered before testimony is taken. And, of course, they are only usable against parties to the Government action.

We therefore conclude that Section 16(b) tolled the statute as against International until the Government's Minnesota case was completed even though a consent decree was entered against International several years earlier. See State of Michigan v. Morton Salt, above.

In view of our decision we do not reach other issues raised by the parties.

The judgments of the district court will be reversed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

THE STATE OF NEW JERSEY, et al.,

Plaintiffs,

v.

MORTON SALT COMPANY, et al.,

Defendants.

CIVIL ACTION
NO. 687-65

The Court: Gentlemen, we are dealing today with five motions. The first is Defendant International's motion for partial summary judgment. The second is Plaintiff New Jersey's motion to amend the complaint and in the alternative to file responsive pleading to allege fraudulent concealment. The third is a motion of Defendants Winans Carter Corporation and Winans Reliance Corporation and C. G. Winans Company for partial summary judgment. The fourth is Defendant Charles Schaefer Sons, Inc. for partial summary judgment with the same cutoff date, October 21, 1961, as Winans contends for. The fifth is the motion of National Oil & Supply Company for partial summary judgment with a cutoff date somewhat subsequent to the one urged by Winans because National Oil & Supply Company was not brought into the case by the amended complaint of plaintiff but rather brought in by an intervening plaintiff at some subsequent time.

The original complaint in this case was filed by the State of New Jersey on June 28, 1965, and that date is exactly four years from the date that an indictment was returned in the Federal criminal action in the United States District Court in Minnesota, filed or returned on June 28, 1961. In that Federal action, in the civil action brought by the Federal Government a few weeks after the indictment was returned, Morton, Diamond and International were defendants. Also, Morton, International and Diamond were defendants in the original complaint filed by New Jersey on June 28, 1965. When that original complaint was filed in this court, there was no timely service of it, and the summons that was to accompany the complaint. Rather, the State of New Jersey advised the Clerk

of the Court and the Office of the United States Marshal here not to effect service at that time, requesting that no action be taken regarding the service of process until further advice from the plaintiff was had.

Now, that original complaint filed by the State of New Jersey on June 28, 1965, would appear to be almost an exact copy of a complaint filed by the City of Philadelphia against the same six defendants, I think, that appeared in the original complaint filed here by the State of New Jersey. They are Morton, Pioneer, Salt Service, Incorporated, International, Cayuga, Diamond Crystal. This City of Philadelphia complaint was filed on 7-1-63, roughly two years before the New Jersey complaint was filed in this court.

Now, I have compared these two complaints, the City of Philadelphia and the State of New Jersey, and find they differ only as to the designation of the plaintiff, the City of Philadelphia, of course, substituting the State of New Jersey.

Paragraph 2 of the Pennsylvania action is omitted because it identifies the City of Philadelphia, and paragraph 4. Eastern District of Pennsylvania is changed to District of New Jersey, and a new paragraph 3 of the New Jersey complaint. Is there an additional sixth defendant in the Philadelphia case? I thought they were the same. Are they not the same?

Mr. Van Dusen: I think so.

The Court: I thought I checked them off, but I had five and I see there are six.

Mr. Ryan: There are six, your Honor.

The Court: I could check that very quickly.

Mr. Ryan: Cayuga, Salt Service, Pioneer, Diamond International—

The Court: Yes, they are the same parties. Six, there are six. They are identical parties.

As we go on paragraph by paragraph, we have an exact copy of paragraphs of the Philadelphia complaint. We come to paragraph 15 and there is a recital at the end, "Including the City of Philadelpia and the State of Pennsylvania," and in our paragraph 14 of this complaint they change to "Including the State of New Jersey."

Paragraph 17, City of Philadelphia, again State of Pennsylvania is changed to New Jersey. And damages in paragraph 23 of the Philadelphia suit are in the sum of $655,-701.51. In the New Jersey complaint, damages asked are a more modest amount, I think of $100,000, and they are the sum total of changes that I find in these two complaints.

So the State of New Jersey on the very last day of the four-year period subsequent to the filing of the United States Government action in Minnesota filed with this Court what is in all respects an exact copy of the City of Philadelphia suit against the same defendants, the Philadelphia suit having been filed two years prior.

Now, a notice of motion was filed by Defendant International to dismiss the original complaint, filed by the Plaintiff New Jersey for lack of prosecution and failure to abide by the rules of service and process, and International filed this motion October 15, 1965, made it returnable on November 1, 1965. It was adjourned to November 15, and subsequently adjourned to December 6, 1965.

New Jersey responded by filing an amended complaint on October 25, 1965, and the service of this complaint was effected forthwith. This amended complaint of the State of New Jersey was filed ten days after Defendant Inter-

national had filed its motion to dismiss, and the amended complaint was filed seven days before the original return day of International's motion, all of which, of course, is contrary to the rules of the Court which require a 20-day notice of motion prior to the return day.

Now, the amended complaint eliminated Salt Service, Inc. and eliminated the defendant, Pioneer Salt Company, and added Charles Schaefer Sons, Winans Carter Corporation and Winans Reliance Corporation. Other than the elimination of two of the defendants originally named and named in the Philadelphia suit of two years before and the adding of these three names, the only other changes in this amended complaint are an allegation now for $2 million worth of rock salt purchased and an allegation or a calling of the retained defendants as producers and the new defendants as distributors of rock salt, whereas in the original complaint of the State of New Jersey they were all, the defendants were called rock salt producers. That may be of little significance.

On December 6, 1965, this Court denied Defendant International's motion to dismiss the original complaint on the basis that the delay in serving, effecting service of the original complaint and failure to do so was found to be as the result of excusable neglect and a matter of no prejudice to the defendants.

Although the Court failed to so indicate, I find from a reading of the record I did intend and do now hold that under the Federal Rules of Civil Practice, Rule 15(c), the amended complaint relates back to the date of the filing of the original complaint (June 28, 1965) insofar, of course, as the defendants named in both complaints are concerned, not as to defendants first named in the amended complaint.

In the conclusions given from the bench on December 6, 1965, it was observed that the plaintiff, New Jersey, did not intend to indefinitely delay service of the original complaint, but rather the delay was the result of excusable uncertainty and confusion in the Attorney General's Office, and that the four-month delay between June and October 1965 was not in itself reason to dismiss the original complaint, particularly since prejudice did not result from the delay.

During the several intervening months since the filing of the amended complaint, numerous answers have been filed, and arguments heard in court on various motions. As a result, the issue of the Statute of Limitations has been raised in pleadings and arguments approximately 30 times. Indeed, it would appear to the Court that the issue of the Statute of Limitations was the underlying reason why plaintiff, State of New Jersey, apparently copied a complaint files two years before in Philadelphia and filed it in this court on June 28, 1965, exactly four years after the return of the United States indictment returned in the District of Minnesota.

A notice of motion for a partial summary judgment was filed by Defendant International on June 29, 1966, made returnable July 26, 1966, adjourned to August 4, 1966. The purpose of this motion was to effect, that is to have this Court rule that any recovery by Plaintiff New Jersey against International be limited to a period subsequent to June 28, 1961, or four years prior to the date of the filing of the original complaint in this court.

International based its right to such relief on the grounds that a four-year statute of limitations pertains to any claim which plaintiff might have against it.

The applicable statute of limitations is 15 U. S. C. Section 16(b), which reads as follows:

> "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain or punish violations of any of the anti-trust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceedings shall be suspended during the pendency thereof and for one year thereafter: Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

International argues that the Statute of Limitations had not been tolled as to it by the pendency of a civil action by the United States against International, Morton, Diamond and others filed in the District Court of Minnesota on July 11, 1961, because International had entered into a decree for a consent judgment in that suit on September 18, 1963, effective by its terms, I believe, January 5, 1964, and International argues Plaintiff New Jersey had not filed its suit in this court within one year subsequent to International's departure from or termination in the United States civil action in Minnesota, that is on its departure on September 18, 1963.

Now, International's motion for partial summary judgment was made returnable on July 26, 1966, thirteen months subsequent to Plaintiff New Jersey's original complaint and nine months subsequent to Plaintiff New Jersey's amended complaint.

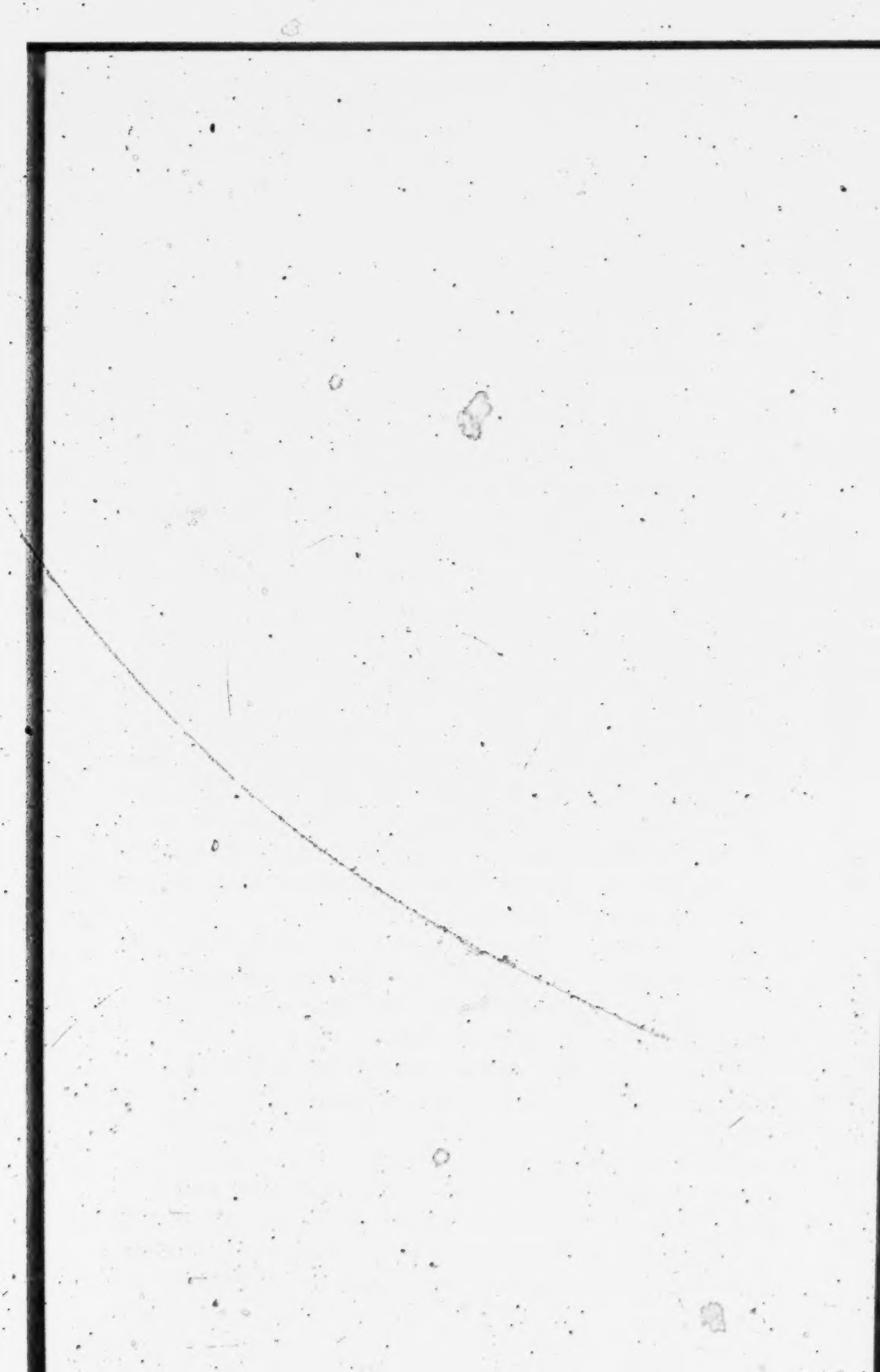
Plaintiff New Jersey again responded to International's move by filing on July 28, 1966, a motion seeking permission to again amend its complaint or in the alternative to file a responsive pleading so as to include an allegation of fraudulent concealment of the conspiracy.

Obviously the motion to amend, if granted, would defeat International's motion for partial summary judgment based on the June 28, 1961, cut-off date.

In keeping with its practice throughout the course of this litigation, plaintiff, in filing its motion, failed to comply with the rules of this court. Its motion was filed only seven days before its return date, which was made to coincide with the date to which Defendant International's motion had been adjourned, August 4, 1966.

Thus, the motion for the right to amend was filed by Plaintiff State of New Jersey nine months subsequent to the filing of its amended complaint and thirteen months subsequent to its original complaint.

On August 4, 1966, when argument was had on International's motion for partial summary judgment, counsel for Plaintiff New Jersey conceded that its complaint had not been filed within the one-year period following International's termination in the Rock Sale anti-trust suit filed by the United States Government in Minnesota in 1961 and argued for the right to amend and thus avoid the effect of the four-year statute of limitations by allegations and



later proof of defendants' fraudulent concealment of their alleged conspiracy.

However, the concession made by plaintiff was made prior to plaintiff's learning of the decision handed down by Judge Larson of the United States District Court for the District of Minnesota on July 28, 1966.

At page 19 of Judge Larson's decision, in summary he states that he has determined:

> "1. That the date which governs the commencement of the tolling of the statute of limitations under Section 5(b) of the Clayton Act is June 28, 1961."

I think I should note, of course, that this memorandum decision was handed down in the cases of the State of Michigan, and all Related Cases Pending in the District of Minnesota, versus Morton Salt, International, and others that appear in this case.

> "2. That the date which governs the termination of the tolling of the statute of limitations under Section 5(b) of the Clayton Act is October 25, 1966."

That is a date which we have not as yet arrived at.

> "3. That Section 5(b) of the Clayton Act applies to all defendants named in these treble damage actions.
>
> "4. That all plaintiffs, including intervenors and members of a class, are entitled to the benefits of Section 5(b).
>
> "5. That the matters complained of in these treble damage actions are based in whole or in part on

the Government litigation within the meaning of Section 5(b)."

If Judge Larson's rulings were to be followed by this Court, all pending motions for partial summary judgment would be denied without regard to plaintiff's proposed amendment. This is so because Judge Larson has held that October 25, 1966, is the date governing the tolling of the Statute of Limitations.

However, the issue of termination resulting from one of several defendants entering into a consent decree prior to the conclusion of Government proceeding against other defendants in an anti-trust suit has been litigated in this District Court for the District of New Jersey in the case of Gordon v. Loew's, Inc., 147 F. Supp. 398, affirmed 247 F. 2d 451 (3rd Cir. 1957).

In this case Judge Wortendyke at page 413, having discussed the Leonia Amusement case, which was heard in New York, Southern District of New York, stated as follows:

"The moving defendant points out that it has been judicially determined that United States v. Paramount Pictures terminated as to RKO on November 8, 1948, the date upon which the defendant entered into a consent decree in that litigation. Grengs v. Twentieth Century-Fox Film Corp., 7 Cir., 1956, 232 F. 2d 325, certiorari denied 352 U. S. 871, 77 S. Ct. 96. In accordance with Section 16 of Title 15 U. S. C. A., the New Jersey six-year statute of limitations began to run against the plaintiff herein on November 8, 1948.

"Inasmuch as this action was commenced on March 3, 1955, all claims which accrued to plaintiff prior to March 4, 1949, are barred by the New Jersey Statute of Limitations. To that extent, the motion of RKO for summary judgment will be granted."

Now the history prior to the Gordon case is that in 1938 the Government had brought a civil action against various exhibitors or distributors in the movie industry. The litigation continued until 1952. However, Defendant RKO then entered into a consent decree on November 8, 1948, and in the Loew case the complaint was initiated on March 3, 1955, and one of the defendants there, RKO, moved for summary judgment on the ground of the Statute of Limitations, and Judge Wortendyke of this district, applying the six-year New Jersey statute, held the Government action terminated as to RKO on November 8, 1948, the date upon which the defendant entered into a consent decree in the litigation.

On appeal, the Third Circuit held the applicable New Jersey Statute of Limitations was two years rather than six years, and thus did not touch on the question of when the Government action against RKO ceased to pend.

Now, other courts have reached the same conclusion the District Court of New Jersey reached in the Gordon v. Loew's Incorporated. In an appeal from the dismissal of the complaint because of the Statute of Limitations, it was held in Grengs v. Twentieth Century-Fox Film Corporation, 232 F. 2d 325, Seventh Circuit, certiorari denied 352 U. S. 871, 77 Supreme Court 96, and I quote:

"These decrees became final on appeal within two years prior to the filing of the suit at bar. Hence

this action was not barred by the statute of limitations, except as to defendants RKO Radio Pictures Incorporated and Paramount Film Distributing Corporation. The latter two defendants entered into consent decrees on November 8, 1948 and March 3, 1949, antedating the commencement of this action by more than two years. As to them the order and summary judgment of the district court is affirmed."

A similar conclusion was reached in Manny v. Warner Bros. Pictures, 116 F. Supp. 807, Southern District of California, 1953, wherein the Court stated, at 809:

"In the case at bar the consent decree as against Paramount was entered on March 3, 1949, and the action was terminated upon the entering of the decree. It would seem unjust to say to Paramount after such a consent decree had been entered and the action terminated as to them that the statute of limitations did not commence to run at that particular time but would be postponed until some future date when judgments were obtained and became final against all of the other defendants."

In Sun Theatre Corp. v. RKO Radio Pictures, Inc., 213 F. 2d 284, Seventh Circuit, it was stated at 292:

"Plaintiff's position is twofold. Thus we must determine, 1. whether the Paramount case continued to pend against these defendants, thus tolling the statute of limitations as to them, until the cause was determined as to all defendants, notwithstanding the prior entry of the consent decrees; and 2. wheth-

er, if the consent decrees are held to be final, that action was nevertheless pending against said defendants within the meaning of Section 5 in view of the various orders entered subsequently thereto modifying those decrees in certain respects.

"The first contention has been urged and rejected by the courts in at least three well considered decisions by district courts. Barnett v. Warner Bros. Pictures Distributing Corp., D. C., 112 F. Supp. 5; Alex Theatre Corp. v. Balaban & Katz Corp., CCH 1952 Trade Cases, Par. 67,357; Manny v. Warner Bros. Pictures, Inc., D. C., 116 F. Supp. 807. In the Barnett case the court said of the consent decrees against these defendants in U. S. v. Paramount, 'It is the opinion of the court that the pendency of a government suit ends (1) when final judgment has been entered after trial and appellate proceedings are concluded, or (2) when final judgment is entered by consent of the parties. Any other construction of Section 5 would lead to long, and in some instances permanent suspensions of all statutes of limitations. Congress could not have intended such a result.' 112 F. Supp. at page 7."

In addition, at page 292, the Court said:

"The consent decrees against the RKO and the Paramount defendants were essentially final in character. From the date of their entry the complaints of the government against the respective defendants were terminated. At that time the purpose of the tolling provisions had been served, and, logically,

> the statute of limitations commenced to run. To hold that the statute is tolled as to all defendants in a government suit until that suit is terminated as to every defendant would result only in placing a premium on dilatoriness and stale litigation."

See also the cases cited by Judge Wortendyke in the Gordone case, particularly Leonia Amusement Corporation v. Loew's, Inc., 117 F. Supp. 747, where it was held the defense of the statute of limitations was tolled as to all defendants that were parties to the Paramount suit, but considered separately, each defendant, determining when the Government action as to that defendant ceased to pend. See also Tague v. Balaban, 146 F. Supp. 356 (Northern District of Illinois 1956).

Again, in Sun Theatres Corp. v. RKO Radio Pictures, Inc., a case cited above at 213 F. 2d 284, the Court was called upon to determine whether consent decrees against two of several defendants, entered more than two years before commencement of the damage case, had terminated the action as to them. In sustaining the defense of the statute of limitations, the Court held, at 293, 294:

> "Plaintiff's reliance on modifying orders entered subsequent to entry of these consent decrees to support its contention that the Paramount case continued to pend against RKO and the Paramount defendants after decrees were entered as to them is, we think, misplaced.
>
> "The court's decree of injunction is no less final merely because from time to time expediting orders are necessary to effect its enforcement.

"We conclude that the two year statute of limitations, although suspended originally as to RKO and the Paramount defendants by the pendency of U. S. v. Paramount, began to run in favor of these against them in that case on November 8, 1948 and defendants when consent decrees were entered March 3, 1949, respectively. Plaintiff's claim is now barred."

Again, at page 293 the Court stated:

"If we should adopt the rule for which plaintiff contends, pendency of the Paramount case as to consenting defendants would be coextensive with the power of the court to enforce its decree, encompassing an indefinite period of time with no foreseeable limits. So construed, Section 5 might, as defendants suggest, suspend the running of statutes of limitations forever. The mere statement of this proposition illustrates its fallacy. Had Congress intended to deny the benefit of limitation statutes to violators of the antitrust laws, that intention would have been clearly expressed. If we cannot imply that general intent, we should not presume that Congress intended that limitations be forever suspended as to the wrongdoer who is caught while the violator who evades detection may invoke their protection. The court's decree of injunction is no less final merely because from time to time expediting orders are necessary to effect its enforcement."

In the present case, International's consent decree would seem to have become binding when it was entered on No-

vember 3, 1963. After that date, as between the Government and International, there were no longer any issues left for adjudication.

Gentlemen, by comity and tradition, brother judges of a multiple-judge district court customarily follow a previous decision of a brother judge upon the same question, except in unusual and exceptional circumstances or unless required by higher authority to do otherwise.

In re Petition of Marko Jerzick, 153 F. Supp. 651, 653 (Western District of Pennsylvania 1957) and U. S. v. Jannuzzi, 22 FRD 223 (District of Delaware 1958).

And it is my intention to follow Judge Wortendyke's decision in the Gordon case.

Thus, applying that decision to the pleadings in their present posture, I must necessarily hold Defendant International terminated its participation in the Government's Minneapolis suit in the fall of 1963, and therefore Plaintiff New Jersey's complaint was filed more than a year subsequent to such termination, and that it therefore follows that the four-year statute of limitations is applicable to International and it is entitled to the granting of its motion unless plaintiff is granted the right to amend its complaint to plead fraudulent concealment.

As to Defendants Winans Carter Corporation, Winans Reliance Corporation and C. G. Winans Company, Defendant Charles Schaefer Sons, Inc. and Defendant National Oil and Supply Company, these defendants were not parties to the United States Government's Minnesota action, and they were not made parties to the original complaint filed by Plaintiff New Jersey on June 28, 1965.

Defendants Winans and Schaefer were first made parties by plaintiff upon the filing of the amended complaint on

October 25, 1965. Defendant National Oil & Supply was brought in subsequently by an intervening plaintiff.

Thus it would appear that these defendants are entitled to the granting of their motions for partial summary judgmenting, restricting damages to the four-year period immediately preceding their respectively being brought into the litigation as parties defendant.

In New Jersey Wood Finishing Company v. Minnesota Mining and Manufacturing, a like fact situation was ruled upon by Judge Augelli of this court, and as pointed out in full in the brief of Winans filed in support of its motion, Judge Augelli ruled:

"The complaint be and the same hereby is dismissed with prejudice as against the defendant Essex Wire Corp. with respect to plaintiff's claim for relief against that defendant for violation of Section 7 of the Clayton Act," on the basis that Essex Wire had not been made a party defendant in a Government anti-trust suit.

And then in an additional paragraph he provides:

> "Plaintiff is given leave to amend the complaint as against defendant Essex Wire Corp. to allege with the requisite particularity overt acts in violation of the Sherman Act committed with four years immediately preceding the filing of the complaint in this matter."

Also, several of the cases I have discussed were set out in the brief of International in support of its motion and cover this very point about non-defendant companies, non-defendants in Government suits not being subject to suspension of the Statute of Limitations, provision 5(b).

Again, Judge Larson has ruled that Section 5(b) may be applied to non-Government defendants—to defendants who were "too low in the conspiracy" to be included as named defendants, or even named co-conspirators in the Government suit.

However, the precedent handed down by Judge Augelli is to be followed here, and defendants' motions will be granted, again subject to whatever action is taken in regard to the plaintiff's motion for right to amend its complaint.

Should higher authority adopt in whole or in part the conclusions that Judge Larson has reached, appropriate relief may be granted by this Court by way of adjustment of any limitation that may be now imposed so as to then conform to the then law of the case.

Now we turn to a consideration of the merits of plaintiff's motion to amend to include the allegations of fraudulent concealment.

Rule 15(a) provides leave to amend "shall be freely given when justice so requires."

Paragraph 21 of the proposed amendment reads as follows:

> "The aforesaid combination and conspiracy necessitated frequent communications among defendants and the co-conspirator companies. These communications were made under the cover of legitimate trade practices. As a result of said communications and other acts done by defendants and the co-conspirator companies for the purpose of actively and fraudulently concealing the existence of the aforesaid combination and conspiracy, plaintiff and inter-

venor plaintiffs neither had knowledge, nor by the exercise of reasonable diligence could they have learned, of the existence of such combination and conspiracy until they first became aware of the government proceedings in July 1961, as hereinafter set forth in Paragraph 22 of this Amended Complaint."

As was clearly stated during the argument had on August 4, the Court is not to determine at this point whether proof of fraudulent concealment has or has not been presented. Rather the determination is as to whether or not "justice requires" that the plaintiff be allowed to amend the complaint as proposed.

In considering that issue, it might be well to state a few definitions of the term "fraudulent concealment."

In the Philadelphia Electric Company cases tried by Judge Lord of the Eastern District of Pennsylvania, in giving instructions on plaintiff's burden to establish fraudulent concealment, he states:

"Now, I mentioned to you that the second prong of the defense was the statute of limitations . . ..

"This is a valid defense unless the defendants here fraudulently and effectively concealed any conspiratorial activities in which they were engaged. If you find that a conspiracy existed and that the plaintiffs were unable to discover the existence of that conspiracy, that the defendants took affrmative steps to conceal their part in the conspiracy and that these steps were successful, then the defendants are

not free to raise the bar of the statute of limitations, and if the plaintiffs have sustained the other elements of their burden of proof, they are entitled to recover for purchases for as long as the conspiracy existed under the evidence here; namely, back to 1946.

"If the plaintiffs knew of the existence of their cause of action or if they had reason to know of any agreement or collusion, and having reason to know or having reason to believe that they would have discovered it in the exercise of reasonable diligence, then the recovery is limited to purchases made after May 25, 1956."

In the Northwest Electric Power Cooperative, Inc. v. Moloney Electric Company, and other related cases, Judge Becker of the Western District of Missouri, in giving instructions on this issue stated:

"Concealment means the commission of an affirmative act to prevent the plaintiff from obtaining knowledge of the cause of legal action for damages. Silence alone or inaction alone is not enough to constitute fraudulent concealment nor are both together. But under these instructions a member of a conspiracy who remains silent and takes no action may be responsible for the acts of the other conspirators. In addition to showing fraudulent concealment in respect to each transaction occurring prior to May 25, 1956, the plaintiff has the burden of showing by a preponderance of the evidence that such fraudulent concealment prevented it from discovering its

cause of legal action for damages. And that by the exercise of reasonable diligence it could not have discovered its cause of legal action for damages in respect to the transaction in question * * *."

Again, in the City of Burlington, Vermont, and others, v. Westinghouse Electric Corporation, an electric equipment conspiracy case, Judge Sirica of the District of Columbia, again instructing on plaintiff's burden to establish fraudulent concealment, stated as follows:

"The exception to the normal operation of the statute of limitations to which I have referred, and upon which plaintiff relies, is known as the doctrine of fraudulent concealment. Simply stated, the doctrine of fraudulent concealment is this: That because of affirmative actions taken by the defendants to conceal their activities, if any, in violation of the antitrust laws the plaintiff claims that it did not know and could not, by the exercise of due diligence, have learned enough about the existence of such activities to be put on notice that it may have had a claim against defendants so as to permit plaintiff to bring suit upon that claim within the period normally allowed by the statute of limitations."

Now, in the light of those definitive assertions, I intend to talk now on the proofs submitted by both sides on the motion for the right to amend.

Defendant International has submitted a letter dated March 21, 1960, written by Burrell Ives Humphreys, Deputy Attorney General of the State of New Jersey, to the

Division of Antitrust, Department of Justice, in which he states:

"Dear Sir:

"The State of New Jersey has been receiving identical bids from various concerns for the supplying of rock salt. We have been informed that your office is currently investigating the submission of identical bids to federal agencies for the supplying of rock sale.

"We should appreciate very much receiving any information which you may have with respect to this problem. Specifically, we should like to know the concerns who are being investigated, the statuts of the investigation and the persons or branches of government in charge of this investigation."

Further, a clipping from the New York Times of August 5, 1960, entitled, "Rock Salt Inquiry Broadened by U. S.

"Special to The New York Times.

"The Justice Department has broadened an inquiry into allegations of price-fixing on the rock salt that is used to melt ice on the nation's streets and highways.

"The anti-trust division has requested data from forty cities, including New York, and from an unspecified number of state agencies, including the Port of New York Authority, it became known today.

"The data are to be presented to a Federal grand jury, now in recess," and so on and so forth.

Then, also, there appears a Trenton date of August 4 in that same clipping.

> "New Jersey will receive bids Aug. 16 on 21,000 tons of rock salt for ice control. Charles F. Sullivan, State Director of Purchase and Property, said today he hoped the bids would produce competition. Last year only three identical bids were submitted."

Then a clipping of the Newark Evening News in their edition of August 17, 1960, entitled "Economy Move. "State Eyes Rock Salt Substitute," and it says under AP Trenton byline:

> "Charles F. Sullivan, New Jersey director of purchase and property, is going to find out if a substitute for rock salt can be used to clear snow and ice from state highways.
>
> "The division received five bids yesterday on a contract to supply the state with 21,000 tons of rock salt.
>
> "Sullivan said four firms based their offers on a price of $8.40 a ton at the mine, plus shipping costs. But he said one firm submitted a much lower price for a synthetic material which it manufactures. The firm is the Monroe Co. of Cliffwood.
>
> "May Test Material
>
> "The offer will be studied by his division and the State Highway department as rapidly as possible, Sullivan said, and the material may be tested. He said it must be determined if the material can be

transported and stockpiled easily, if it will work in the department's salt spreaders, if it will damage road surfaces, and if it is as effective as salt.

"Favorable reports might cause the division to throw out all the bids received yesterday, change the specifications in the contract and advertise for new bids, Sullivan said.

"Sullivan has been trying for more than a year to bring about what he considers competitive bidding on rock salt and to break through the prevailing price.

" 'As far as the sources of supply are concerned, we got no competition,' he commented of the bids yesterday."

A further clipping from the Newark Evening News dated September 2, 1960, under a heading, "Salt Price Action Due.

"State Seeking to Break Industry's Policy of No Competition.

"Trenton (UPI)—Gov. Meyner will confer with state officials Sept. 13 in an attempt to break the fixed price policy of the rock salt and calcium chloride industry.

"Charles F. Sullivan, state director of purchase and property, announced yesterday that six identical $116,051 bids had been received for supplying 2,970 tons of calcium chloride.

"Calcium chloride is mixed with rock salt to speed up the melting properties of rock salt in very cold

weather. The Highway Department spreads the mixture on roads.

"Earlier the state received two identical $589,444 bids for supplying 21,985 tons of rock salt for coming winter needs.

"Sullivan, State Treasurer John F. Kervick and Highways Commissioner Dwight R. G. Palmer will confer with the governor on the problem, Kervick said.

" 'We may try to take steps to break up the fixed bidding,' Kervick said.

"A federal grand jury sitting in Chicago has launched a national investigation of prices in the rock salt industry."

Then a further clipping taken from the Trentonian, a publication here in the State Capitol dated September 14, 1960, under the heading, "State Will Fight Salt, Chloride Price Fixing," and it reads:

"The state decided yesterday to go to court in an attempt to break up fixed-price bidding by rock salt and calcium chloride suppliers.

"Gov. Meyner made the decision in a private conference with Purchase and Property Director Charles F. Sullivan, Highway Commissioner Dwight R. G. Palmer and State Treasurer John A. Kervick.

"The State recently received six identical bids of $116,051 for supplying 2,970 tons of calcium chloride,

which is mixed with rock salt to trigger the latter's ice-melting ability in cold weather.

"Earlier, the state received two identical $389,444 bids for supplying 21,965 tons of rock salt.

"Kervick said award of the contracts will be held up until the attorney general can initiate legal action.

"Sullivan said New England states bought rock salt for $5.40 a ton (at-mine-rate) last year from the same companies that charged New Jersey $8.40 a ton.

"Kervick explained the state will have to award contracts before winter sets in, because the contracts represent the state's entire year's purchase of highway ice-melting chemicals. But he said the price could be open to revision if the state gets court relief.

"The bidders who were awarded last year's contracts in fixed-price bidding are among the identical bidders this year, Kervick said. These bidders are suppliers, but 'the price is fixed at the source of supply, which prevents competitive bidding', Sullivan said recently.

"Kervick said the attorney general will decide whether New Jersey will join in a federal court action already under way in Chicago or will initiate its own suit under state laws."

Then there is a letter from the State of New Jersey signed by Burrell Ives Humphreys, Deputy Attorney Gen-

eral, written to Honorable Robert A. Bicks, Acting Assistant Attorney General, United States Department of Justice, Room 404, United States Courthouse, Chicago 4, Illinois, in which he talks about bids submitted by Charles Schaeffer & Sons of Elizabeth, G. C. Winans Company of Newark, American Oil and Supply, information which he apparently received from the Essex Board of Freeholds, and again says:

> "Will you please tell me the present status of the Grand Jury investigation into rock salt and what future developments we may expect."

That is dated October 2, 1960.

Then there is attached to these other proofs a form sent out by the Antitrust Division from the United States Court House, Chicago 4, Illinois, dated May 10, 1960. This form was submitted to the Purchasing Division of the New Jersey Highway Authority, and it is termed, "Survey Relating to Rock Salt Purchases by State, County and Municipal Agencies."

It asks, among other things, or it has set out in here the dollar value and quantity of rock salt purchased for each of the years during the period 1957 through 1959. It asks with respect to each instance in which identical bids were received, "state any facts or circumstance which tend to support the conclusion that the identical bids received resulted from collusion among the bidders," and other similar inquiries.

This document is some six or seven pages long.

There was also included in this proof submitted by International, Defendant International, a letter dated March

13, 1958, signed by William L. Brach, Chairman, Central Purchasing Committee, City Council, the City of East Orange, New Jersey, which was addressed to the Honorable Victor R. Hansen, Assistant Attorney General, Anti-Trust Division, Department of Justice:

> "I have been directed, on behalf of the East Orange City Council, to call to your attention the following facts on bids for Rock Salt received by The City of East Orange over the past three years. A schedule of said bids is attached hereto.
>
> "It would appear to us, on the face of it, that there is no competition among the respective bidders as the field has been limited to two bidders whose bids match to the penny.
>
> "We are convinced that we are not obtaining the benefits of competition in this area and surmise that the experience of other municipalities is similar to ours.
>
> "We would appreciate your advice as to whether action under the anti-trust laws has been initiated or is contemplated."

A letter dated April 27, 1960, written by Victor R. Fischer, Treasurer, Department of Purchase, Town Hall, West Orange, New Jersey, to Earl A. Jinkinson, Esq., Chief, Midwest Office, Antitrust Division, Chicago 4:

> "Dear Sir:
>
> "Enclosed please find prepared questionnaire which you requested in your letter of April 13, 1960, in regard to Grand Jury Investigation of Possible Antitrust Violations in Sale of Rock Salt."

That covers most of the proofs submitted by the defendant.

The State of New Jersey in answer to that type of proof has submitted an affidavit of Burrell Ives Humphreys, Deputy Attorney General of the State of New Jersey between the years 1959 and 1962. He is now in private practice.

Paragraph 3 says:

> "When I first became involved in matters concerning identical bidding I came into possession of a file in the office of the Criminal Investigation Section dating back to 1955 wherein there was data indicating identical bids had been submitted from bidders for the supplying of various commodities for State use, including rock salt. The data indicated that submitting of uniform bids for rock salt had been a continuing practice.
>
> "4. From 1959 through 1961, I received considerable data concerning identical bids for rock salt. Also during that period our office was in contact with the United States Department of Justice, Antitrust Division, and we supplied this agency with data on identical bids.
>
> "5. Although we made numerous efforts to obtain information from various sources concerning the reason for the high incidence of identical bids for rock salt, we were unsuccessful in developing information upon which in my opinion we could predicate a successful legal action for conspiracy to fix prices.

"6. On April 28, 1960, I drafted an extensive memorandum concerning, *inter alia*, federal antitrust violations and conspiracies to violate the Federal Antitrust Law by fixing prices. In that memorandum I indicated to Attorney General David D. Furman, through the Director of Criminal Investigation Section, that we did not know of any agency arrangement made among the rock salt bidders; nor how the identical prices were reached; and that in my opinion we did not at that time have adequate proof of a conspiratorial agreement in violation of the antitrust laws. Accordingly I recommended against litigation at that time. My recommendation was followed. During 1960 and 1961 we continued to accumulate information concerning identical bidding but without being able to develop information upon which to base a suit under the antitrust statutes."

He talks about during 1960 receiving information from the New Jersey Turnpike Authority and the New Jersey Highway Authority, copies of reports to the United States Department of Justice Antitrust Division, copies of which are attached hereto. He makes reference in Paragraph 8 to the September 14, 1960, issue of "The Trentonian," and he says:

"I have also been advised that the defendants in the above-entitled suit are relying upon this news release as evidence of the State's knowledge of a conspiratorial arrangement in the rock salt industry. Information contained in the file indicates that no such order was issued and that the newspaper

article was incorrect in that regard. To the best of my recollection, the State at the time of the publication of said newspaper article possessed no more information concerning any collusive agreement in violation of the antitrust laws with respect to rock salt beyond that of identical bids with which the Attorney General's office had already been familiar for some time.

"9. On July 6, 1961, the Criminal Investigation Section of the Attorney General's office received a newspaper clipping from the 'Philadelphia Inquirer' dated June 29, 1961, referring to an indictment by a Federal grand jury of 'four of the nation's leading salt companies.' Subsequently, on July 14, 1961, I received a letter dated July 12, 1961, from the United States Department of Justice advising me 'that on June 28, 1961 a federal grand jury sitting at Minneapolis Minnesota, returned a True Bill' "

against Morton, International Salt, and others for unlawful conspiracy.

He says that the Attorney General's files revealed no copies of these newspaper articles. He was unable to comment upon them without having them available.

He believes there is nothing in the office that would indicate such articles were called to the attention of the Attorney General or brought to the State's attention over and above what was already in its possession, and that the Attorney General did not at any time while he was in office order any investigation to be undertaken with respect to collusive bidding in the rock salt industry in vio-

lation of the antitrust statutes beyond the accumulation of bidding information and cooperation with other governmental bodies.

Then he includes or attaches to his affidavit a letter dated June 7, 1960, from the Garden State Parkway by D. Louis Tonti, Executive Director, a letter of transmittal forwarding the information he had sent to the Antitrust Division of the Federal Government. There is a list of vendors to whom bids were forwarded from 1955 to that date. It has bid opening dates, first bid, bid made, and so forth. It is Turnpike information given to the Antitrust Division showing the history of bidding by various companies in New Jersey.

There is a letter dated October 21, 1960, written by the Port of New York Authority by Sidney Goldstein to Hon. David R. Furman, Attorney General, which says:

> "In accordance with my telephone conversation with you the other day, I have forwarded to the U. S. Assistant Attorney General, in charge of antitrust, information on bids received by the Port Authority for rock salt, in connection with the Justice Department's investigation of rock salt prices. A copy of my letter together with a tabulation of bids received by the Port Authority is enclosed.
>
> "If you should wish any further information, I will, of course, be happy to furnish it."

Then there is a copy of a letter written by Sidney Goldstein to the Hon. Robert A. Bicks, Assistant Attorney General, dated October 21, 1960, concerning Rock Salt Bids, et cetera. That would appear to be the most pertinent of the proofs.

In addition to that, the State of New Jersey has filed a copy of the deposition of Edward L. Fuller, who is and has been the President of International Salt Company, defendant, since 1931. I have carefully gone through this deposition, and it contains nothing of affirmative value, as I see it, in regard to fraudulent concealment. As a matter of fact, I think the State offers it in sort of a negative way to show Mr. Fuller knew nothing and hence how could the State of New Jersey be expected to know about this.

In Philco Corporation v. Radio Corporation of America, 186 F. Supp. 155 (1960), it is stated:

> "Philco, through its top officials, was thus informed of the very facts which it then recognized as constituting a 'tortious interference in Philco's contract negotiations and a violation of the anti-trust laws,' (page 31 of plaintiffs' brief),"

—I am not sure what that is—

> "and which they now allege as the very claim for relief which was concealed from them. We emphasize the point that they were not given facts which create suspicion or indicate the possibility of a claim for relief based upon the antitrust laws. Rather they were given the essential facts now constituting their claim for relief (minus only the fact of injury to the public and to themselves). And they recognized them as constituting a cause of action at that time. The knowledge of such facts constituted knowledge of the cause of action now claimed to have been concealed. Such knowledge negates the existence of an element essential to the defense of concealment."

Also, in Kansas City, Missouri v. Federal Pacific Electric Co., 310 F. 2d 271 (1962), I quote:

> " 'To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side.'
>
> • • •
>
> " '• • • we hold that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him.' " 88 U. S. at pp. 349, 350.

The State of New Jersey in its brief cites Kansas City, Missouri v. Federal Pacific Co., 310 F. 2d 271 (8th Cir. 1962), and in a quotation from that case it appears:

> "In summary, we hold that the fraudulent concealment doctrine is to be read into the statute of limitations so that under circumstances here allegedly present, the limitation period begins to run from the time that plaintiff by the exercise of reasonable

diligence, discovers or should have discovered the cause of action."

Further, in that brief they cite the landmark case of Bailey v. Glover, 88 U. S. 342, 22 L. Ed. 614 (1874).

"that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.' "

Gentlemen, I have carefully weighed the proofs before me and all that I have talked about today, and I am compelled to the conclusion that there has been negligence, laches on the part of the plaintiff, New Jersey, in this case. The claim of collusion, of violation of the antitrust law was open and notorious certainly in 1960. Claims of this nature from reputable people, and statements appeared in various newspapers throughout the eastern seaboard, and it seems to me that New Jersey very clearly on the proofs before me—and I am not determining whether or not there was fraudulent concealment—but on the proofs before me has been negligent, guilty of laches in not proceeding to investigate further and further as to all the publicity, and this knowledge called for it to do so,—and not proceeding forthwith and filing a suit in this court, not on the last day of the four-year period but rather much sooner and including all the allegations that it might have, includ-

ing the one asked for now of fraudulent concealment long before this original suit was filed.

On that basis it is my determination in the interest of justice that I am required to deny the petition or request of the State of New Jersey for the right to amend to include the allegation of fraudulent concealment.

Mr. Ryan: Do I understand correctly, then, your action in denying this motion also results in the granting of our motion for partial summary judgment?

The Court: Yes, sir. After the granting of that motion, subject to anything on appeal, but subject more particularly to any subsequent adjudication of Judge Larson's holdings, because if his holdings, any one or more or all become the law of this case, then I would expect the application to be made before me for an adjustment in accordance with whatever the law may then be as to the periods of damages provable.

Mr. Brochin: Your Honor, of course interrogatories have been submitted to the local defendants by the plaintiff and intervenors. May we assume that the period as to which answers must be supplied in answer to those interrogatories now is shortened to the period limited by the partial summary judgment?

The Court: No, I think not. I think we must be much broader and continue to be by way of discovery for matters of proof that may seem cumbersome to you but may lead up to actual proof of the four-year, damage occurring, if any, during the four-year period I have indicated. It may be before we are finished with this case it will be much greater than four years. I think we ought to have broad inquiry, still.

Mr. Brochin: Since I raised this right off the top of my head, I hope that your Honor's comments won't preclude us from moving to suppress particular interrogatories which we may think would be relevant only to damages if the damages were allowable prior to the four-year period.

The Court: I couldn't lay out some offhand rule now that would cover all contingencies. You are not barred from moving here, there and elsewhere where you think you should.

Mr. Lichtenstein: Do you want an order presented with regard to your decision?

The Court: I certainly do.

Mr. Lichtenstein: Circulated and consented to by all counsel prior to being submitted to you?

The Court: Yes, sir.

Mr. Gold, I assure you and your associates that there is no intent on my part to be critical of you or any of your associates personally. I think this is long-range neglect by plaintiff. I know that you have been assigned a thousand duties, not just the rock salt duties. I intend nothing along those lines at all, and it is hardly necessary for me to state so, but I want it clear on the record.

Gentlemen, anything further?

(Discussion off the record.)

Order Granting Motions for Partial Summary Judgment and Denying Motion for Leave to File Amended Complaint or Responsive Pleading

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

THE STATE OF NEW JERSEY, *et al.*,

Plaintiffs,

v.

MORTON SALT COMPANY, *et al.*,

Defendants.

CIVIL ACTION

No. 687-65

This matter having been opened to the Court by Stephen F. Lichtenstein and Lewis H. Van Dusen, Jr., attorney and of counsel respectively for defendant International Salt Company, by Lowenstein & Spicer, Murry D. Brochin appearing, attorneys for defendants Winans Carter Corp., Winans Reliance Corp., and C. G. Winans Company, by Wilentz, Goldman & Spitzer, Francis X. Journick appearing, attorneys for defendant Chas. Schaefer Sons, Inc., and by Green & Lasky, H. Kermit Green appearing, attorney for defendant National Oil & Supply Co., all on Motions for Partial Summary Judgment and by Arthur J. Sills,

Order Granting Motions for Partial Summary Judgment and Denying Motion for Leave to File Amended Complaint or Responsive Pleading

Attorney General of New Jersey, Avrom J. Gold appearing, attorney for the State of New Jersey, on Motion for Leave to File an Amended Complaint or in the alternative to file a Responsive Pleading, and the Court having considered the Affidavits and Briefs and having heard the arguments of all counsel, and there appearing good cause for the entry of the following Order;

It is on this 17th day of October, 1966 ORDERED that the Motion of the State of New Jersey for leave to file an amended complaint or in the alternative to file a Responsive Pleading be and hereby is denied; and

It further is ORDERED that the Motion of defendant International Salt Company, Winans Carter Corp., Winans Reliance Corp., C. G. Winans Co., Chas. Schaefer Sons, Inc. and National Oil & Supply Co. for Partial Summary Judgment be and hereby are granted, in accordance with the following:

(a). The Motion of defendant International Salt Company for Patrial Summary Judgment is granted and the Complaint against it of the State of New Jersey and of all intervenors hereby is dismissed as to all damages which are alleged to have accrued on or prior to June 28, 1961 or insofar as the said damages are based upon acts which are alleged to have occurred on or prior to June 28, 1961.

(b). The Motions of defendants Winans Carter Corp., Winans Reliance Corp., and C. G. Winans Co. for Partial Summary Judgment are granted and the Complaint of the State of New Jersey and of all

Order Granting Motions for Partial Summary Judgment and Denying Motion for Leave to File Amended Complaint or Responsive Pleading

intervenors hereby is dismissed against Winans Carter Corp., and Winans Reliance Corp., as to all damages which are alleged to have accrued on or prior to October 25, 1961, or insofar as the said damages are based upon acts which are alleged to have occurred on or prior to October 25, 1961, and against C. G. Winans Co. as to all damages which are alleged to have accrued on or prior to July 14, 1962 or insofar as the said damages are based upon acts which are alleged to have occurred on or prior to July 14, 1962.

(c). The Motion of defendant Chas. Schaefer Sons, Inc. for Partial Summary Judgment is granted and the Complaint of the State of New Jersey and of all intervenors hereby is dismissed as to all damages which are alleged to have accrued on or prior to October 25, 1961 or insofar as the said damages are based upon acts which are alleged to have occurred on or prior to October 25, 1961.

(d). The Motion of defendant National Oil & Supply Co. for Partial Summary Judgment is granted and the Complaint of the State of New Jersey and of all intervenors hereby is dismissed as to all damages which are alleged to have accrued on or prior to March 14, 1962 or insofar as the said damages are based on acts which are alleged to have occurred on or prior to March 14, 1962.

ARTHUR S. LANE
Judge of the Federal District Court

Order Granting Motions for Partial Summary Judgment and Denying Motion for Leave to File Amended Complaint or Responsive Pleading

CERTIFICATION

Upon application of the plaintiffs and pursuant to 28 U. S. C. 1292(b), I certify that I am of the opinion that the above order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal may materially advance the ultimate termination of the litigation.

ARTHUR S. LANE
Judge of the Federal District Court

Hearing of November 21, 1966

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY.

THE STATE OF NEW JERSEY, on behalf of itself and all others similarly situated,

v.

MORTON SALT COMPANY, an Illinois corporation, et als.

Civil 687-65.

Trenton, New Jersey
November 21, 1966

Before THE HONORABLE ARTHUR S. LANE, USDJ.

Hearing on Motion of Defendant, Cayuga Rock Salt Company for Partial Summary Judgment.

Appearances:

ORLANDO & CUMMINS, for Cayuga Rock Salt Co.
By: GEORGE H. HOHWEILER

DONALD BROWN (Pennsylvania Bar) of Counsel
JAMIESON, WALSH, MCCARDELL & MOORE, for Morton Salt Co.
By: EDWARD J. MCCARDELL, JR.

ADRIAN M. FOLEY, for Garden State
By: KENNETH F. KUNZMAN

Hearing of November 21, 1966

(2)

The Court: I had a call from your adversary who made the mistake of playing touch football with his children and ended up with a sprained ankle and doesn't care to be here today. I told him over the phone that I reviewed the file again. I think I know it, and I pointed out that Winans—I can't be precise about this—but Winans' answer was filed in December, I think December 16 of 1965, and Winans, first in writing, although we discussed the Statute of Limitations in few oral arguments, Winans has as its first or third defense the Statute of Limitations.

You, on February 14, filed an answer for your company with a separate defense of the Statute of Limitations, the third separate defense.

International, I think, was filed on June 18—no, May 2 filed an answer with the Statute of Limitations defense.

The State of New Jersey came in, finally, on June 28 of '66, more than seven months subsequent to Winans' defense, some five months subsequent to your defense of the Statute of Limitations, some two or three months subsequent to

(3)

International's defense, and I told these gentlemen handling this from the Milton firm that my holding in this, on this motion, would be the same as my holding on the International motion. I will give you the same order, the same form of order.

It is perfectly acceptable, isn't it?

Mr. Brown: Yes, your Honor.

The Court: It is to him, because he wanted all the provisions of the original order incorporated in this order. I will give you this with the cutoff date wherever it should be.

Mr. Brown: It will be the same.

Hearing of November 21, 1966

The Court: Then this matter can be taken to the Court of Appeals together with International, and they will resolve all the difficulties, I hope.

Do you care to say anything?

Mr. Kunzman: No, that is fine.

The Court: One other thing, I have a letter from you or your agency and a letter from the Turnpike Authority. You are Garden State. Both say in the letter you formally join. I don't think you formally join anything by a letter. I don't know, I am not practicing, but I don't

(4)

think that is the way you formally get into the picture.

Mr. Kunzman: This was a motion by Cayuga and we were present on the return day of the motion.

The Court: I am not discouraging you. I just say as a matter of record maybe you ought to do more than just send me a letter and say, "We are formally in the picture." I think maybe you need something else. I don't know. That is your problem.

Mr. Brown: Do you want me to submit a form of order?

The Court: I certainly do, and quickly, so we get the matter packaged up and it is on its way to Philadelphia.

Mr. Brown: Yes, your Honor.

The Court: I pointed out to the proponent—no, it is your motion.

Mr. Brown: Yes, your Honor.

The Court: Your adversary, in answer, I think in a declaration he makes in his brief, wherein he contends that I, in effect, on that long motion decision from the bench, that I held as a matter of fact that there was no fraudulent

(5)

concealment in this case. Now, I did not intend to so hold and didn't think I had so held, and I reviewed the whole transcript, and I don't think I made any such holding. My holding is simply and solely that the State of New Jersey failed to abide by the rules of this Court and failed for month after month after month to move in this case when they were required to, and that in connection with all the other failures to move over a period of many years constituted, in my judgment, sufficient reason for me, in the exercise of my authority, to deny their motion to again amend their complaint. Now, that is all I think I held. That is all I am holding now.

Mr. Brown: Yes, your Honor, that is my understanding.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

THE STATE OF NEW JERSEY, et al.,
Plaintiffs,

v.

MORTON SALT COMPANY, et al.,
Defendants.

CIVIL ACTION
NO. 687-65

Order Granting Motions for Partial Summary Judgment and Denying Motion for Leave to File Amended Complaint or Responsive Pleading

Order Granting Motion of Defendant, Cayuga Rock Salt Company, for Partial Summary Judgment and Denying Motion of Plaintiff for Leave to File Amended Complaint or Responsive Pleading

This matter having been brought before the Court by George H. Hohweiler and Donald Brown, attorney and of counsel respectively, for defendant, Cayuga Rock Salt Company, on its Motion for Partial Summary Judgment, and by Arthur J. Sills, Attorney General of the State of New Jersey, and Frank J. Cuccio, County Counsel for the County of Bergen, having appeared by their Special Counsel, Milton, Keane & DeBona (Allan H. Klinger of that firm appearing), and Pindar, McElroy, Connell & Foley (Kenneth F. Kunzman of that firm appearing), counsel for New Jersey Highway Authority, and Herbert I. Olarsch, counsel for New Jersey Turnpike Authority, on plaintiff's Motion for Leave to File an Amended Complaint or in the alternative to File a Responsive Pleading; and the Court, having considered the Affidavits and Briefs and arguments of counsel, and upon a hearing for settlement of the form of the Order and there appearing good cause for the entry of the following Order:

It Is, on this 30th day of December, 1966, Ordered that the Motion of the State of New Jersey for Leave to File an Amended Complaint or in the alternative to File a Responsive Pleading be and is hereby denied; and

It Is Further Ordered that the Motion of Defendant, Cayuga Rock Salt Company, for Partial Summary Judgment be and is hereby granted, in accordance with the following:

(a) The Motion of Defendant, Cayuga Rock Salt Company, for Partial Summary Judgment is granted and the

Order Granting Motion of Defendant, Cayuga Rock Salt Company, for Partial Summary Judgment and Denying Motion of Plaintiff for Leave to File Amended Complaint or Responsive Pleading

Complaint against it of the State of New Jersey and of all intervenors hereby is dismissed as to all damages which are alleged to have accrued on or prior to June 28, 1961 or insofar as the said damages ar based upon acts which are alleged to have occurred on or prior to June 28, 1961.

/s/ ARTHUR S. LANE,
Judge of the Federal District Court

CERTIFICATION

Upon application of the plaintiffs and pursuant to 28 U.S.C. 1292(b), I certify that I am of the opinion that the above order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal may materially advance the ultimate termination of the litigation.

ARTHUR S. LANE,
Judge of the Federal District Court

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1957

Nos. 1046 & 1048

INTERNATIONAL SALT COMPANY,

Petitioner in No. 1046,

and

CAYUGA ROCK SALT COMPANY, CHAS. SOMAR-FER SONS, INC., WINANS CARTER CORP., WINANS RELIANCE CORP. and G. S. WINANS COMPANY,

Petitioners in No. 1048,

v.

STATE OF NEW JERSEY, on Behalf of Itself and All Others Similarly Situated, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Raymond Bellour,
Hans A. Bohrer,
Meyner, Landis & Bellour,
20 Journal Square,
Jersey City, New Jersey,
Special Counsel to the Board of Public Utility Commissioners,

Parker McCay, Attorney General of New Jersey,
State House,
Trenton, New Jersey,
Attorney for Respondents.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	5
CONCLUSION	7
APPENDIX:	
A—Extract from Plaintiff's Brief in Answer to Briefs in Chief of Defendants Morton Salt Company and Diamond Crystal Salt Company, et al., Submitted on Behalf of Plaintiff in United States of America v. Morton Salt Company	1a
B—Complaint in the United States District Court for the District of Minnesota, Fourth Division	4a
C—Final Judgment in the United States District Court for the District of Minnesota, Fourth Division	13a
D—Final Judgment in the United States District Court for the District of Minnesota, Fourth Division	22a
E—Amended Final Judgment of the United States District Court for the District of Minnesota, Fourth Division	28a
F—Memorandum Decision of the United States District Court for the District of Minnesota, Fourth Division	36a
G—Findings of Fact and Conclusions of Law of the United States District Court for the District of Minnesota, Fourth Division	46a

PAGE

Cases Cited

Charles Rubenstein, Inc. v. Columbia Pictures Corp., 289 F. 2d 418 (8th Cir. 1961) 5, 6

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 377 F. 2d 766 (3rd Cir. 1937), cert. granted, 88 S. Ct. 86 (1967) 6, 7

Hardy Salt Company v. State of Illinois, 377 F. 2d 768 (8th Cir. 1967) 6

Leh v. The General Petroleum Corp., 382 U. S. 54 (1965) 5, 6

Lyons v. Westinghouse Electric Corp., 235 F. Supp. 526 (S. D. N. Y. 1964) 7

Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U. S. 311 (1965) 5, 6

Morton Salt Company v. United States, 382 U. S. 44 (1965) 4

Simpson v. Union Oil Co., 377 U. S. 13 (1964) 6

State of Michigan v. Morton Salt Company, 259 F. Supp. 35 (D. Minn. 1966) 3fn, 6

State of New Jersey v. Morton Salt Co., 387 F. 2d 94 (3rd Cir. 1967) 6

State of Vermont v. Cayuga Rock Salt Co., 276 F. Supp. 970 (D. Me. 1967) 6

Statutes Cited

15 U.S.C. (Clayton Act):

Sec. 4B 4

Sec. 5 5

PAGE

15 U.S.C. (Clayton Act):

Sec. 5(a) 4

Sec. 5(b) 1, 4, 6

Sec. 15(b) 4

Sec. 16(b) 1, 4

15 U.S.C. (Sherman Act):

Sec. 1 2

Sec. 2 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 1345 & 1346

INTERNATIONAL SALT COMPANY,

Petitioner in No. 1345,

and

CAYUGA ROCK SALT COMPANY, CHAS. SCHAEFER SONS, INC., WINANS CARTER CORP., WINANS RELIANCE CORP. and C. G. WINANS COMPANY,

Petitioners in No. 1346,

v.

STATE OF NEW JERSEY, on Behalf of Itself and All Others Similarly Situated, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Questions Presented

1. Is the applicable statute of limitations in a private antitrust action suspended under Section 5(b) of the Clayton Act, 15 U.S.C. §16(b), as to all defendants during

the pendency of a civil or criminal proceeding instituted by the United States and for one year thereafter, notwithstanding the entry of a consent decree as to one defendant?

2. Is the applicable statute of limitations in a private antitrust action suspended under Section 5(b) of the Clayton Act, 15 U.S.C. §16(b), during the pendency of a civil proceeding instituted by the United States and for one year thereafter as to defendants who, though named neither as defendants nor as co-conspirators in the government proceeding, are alleged in the private antitrust case to be conspirators and participants in matters substantially identical to those involved in the government proceeding?

Statement of the Case

The petitioners are producers and distributors of rock salt in the United States and New Jersey. On July 11, 1961, Morton Salt Company, International Salt Company and Diamond Crystal Salt Company (referred to herein as Morton, International and Diamond, respectively), together with others, were named as defendants in a civil action instituted by the United States in the United States District Court for the District of Minnesota (App. B, p. 4a). That suit alleged that the defendants were engaged in a continuing combination and conspiracy to fix prices and to submit collusive bids for the sale of rock salt in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

Cayuga Rock Salt Company, Chas. Schaefer Sons, Inc., Winans Carter Corp., Winans Reliance Corp. and C. G. Winans Company, petitioners here, were not made defendants in the government action. Nor were they designated as co-conspirators. In fact, none of them conducted business in any of the midwestern states.

Contrary to the assertion made in both the present Cayuga petition and the International petition, the federal government's action against the salt companies did not confine itself to a local or midwestern conspiracy. As stated in a footnote at page 4 of the Plaintiff's Brief, filed on behalf of the United States in that action, in answer to Briefs in Chief of Defendants Morton and Diamond:

> "* * * Both the indictment and the complaint charge a nationwide conspiracy. Plaintiff limited its trial proofs of identity of bids to 17 selected geographic areas, as typical of bid patterns throughout the country. This was done in the interest of keeping cumulative evidence within reasonable bounds." (App. A, p. 1a)

Furthermore, the judgments entered against the defendants and the restraints contained therein were not restricted to any geographic area or to any one group of rock salt purchasers (App. C, D, E, pp. 13a, 22a, 28a). Finding of Facts VIII (App. G, p. 50a) of the Findings of Fact and Conclusions of Law entered in the government's civil action clearly indicates that the conspiracy involved in that case affected governmental purchasers of rock salt beyond the six-state midwestern area referred to earlier. The government, in the interests of economy and efficiency of trial administration, merely limited its proofs to evidence of purchases by seventeen (17) governmental entities in the States of Ohio, Indiana, Illinois, Michigan, Minnesota and Wisconsin[1] (App. A, p. 2a). The theory upon which

[1] The named purchasers were: State of Minnesota, City of Minneapolis, City of St. Paul, State of Wisconsin, City of Milwaukee, State of Illinois, Illinois Toll Road, City of Chicago, Chicago Transit Authority, State of Indiana, Indiana Toll Road, State of Michigan, Wayne County, City of Detroit, State of Ohio, Ohio Turnpike Commission and the City of Baltimore. The City of Baltimore was later excluded from the Court's findings of fact without explanation. See *State of Michigan* v. *Morton Salt Company*, 259 F. Supp. 35, 70-71 (D. Minn., 1966), for a discussion of the geographic area involved in the government action.

the governmental case was tried and decided was that there was a nationwide conspiracy among producers and distributors of rock salt to fix prices. Plaintiffs in this law suit have alleged that the same patterns of illegal conduct proven in the prior government action prevailed in New Jersey during the relevant periods.

In comparing this case with the prior government action, it should be kept in mind that for purposes of tolling the statute of limitations all that section 5(b) of the Clayton Act requires is that the present action be "based in whole or in part on any matter complained of" in the prior government action. The more stringent rules of collateral estoppel, applicable under section 5(a), the *prima facie* evidentiary section, are not applicable to the questions posed by these petitions.

International entered a consent decree on November 4, 1963 and thereupon terminated its participation in the government action. Judgment against defendants Morton and Diamond was entered on November 24, 1964 and were affirmed by this Court on October 26, 1965, in *Morton Salt Company* v. *United States,* 382 U. S. 44 (1965).

After initiation of the present action on June 28, 1965, the defendants, petitioners in this Court, filed answers which asserted the defense of the applicable statute of limitations, Section 4B of the Clayton Act, 15 U.S.C. §15b. Thereafter, petitioners moved for partial summary judgment based on that defense. The United States District Court for the District of New Jersey granted petitioners' motions.

Interlocutory appeals were taken to the United States Court of Appeals for the Third Circuit. On December 8, 1967, that Court rendered its opinion and entered a judgment reversing the judgments of the District Court. The

Court of Appeals held that, pursuant to Section 5(b) of the Clayton Act, 15 U.S.C. §16(b), the pendency of the government action against Morton and Diamond until October 26, 1965, effectively tolled the statute of limitations until one year thereafter as to all defendants in subsequent civil actions wherein the allegations were substantially identical to the matters alleged in the government action, regardless of whether they had been named as defendants or as co-conspirators, and regardless of when they chose to withdraw from that government action.

The Court of Appeals based its conclusions on this Court's statement of the policy underlying Section 5 of the Clayton Act as recently enunciated in *Minnesota Mining and Manufacturing Co.* v. *New Jersey Wood Finishing Co.*, 381 U. S. 311 (1965) and *Leh* v. *The General Petroleum Corp.*, 382 U. S. 54 (1965) (hereinafter referred to as *3M* and *Leh*). The Court of Appeals concluded that prior cases which seemed to support a contrary conclusion relied upon an interpretation of Section 5 of the Clayton Act which was negated by this Court's analysis in the *3M* and *Leh* decisions.

Reasons for Denying the Writ

1. As stated above, the decision of the Court of Appeals for the Third Circuit in this case was based upon certain policy considerations recently enunciated by this Court in *3M* and *Leh, supra.* The so-called conflict in the Courts of Appeals decisions to which petitioners refer exists only between decisions antedating the *3M* and *Leh* decisions and those decided subsequent to those cases. For example, the United States Court of Appeals for the Eight Circuit in the case of *Charles Rubenstein, Inc.* v. *Columbia Pictures Corp.*, 289 F. 2d 418, 422 (8th Cir., 1961), decided prior to the *3M* and *Leh* decisions, affirmed

a District Court holding that the statute was not tolled against a defendant who was not a party to the earlier government action. The same court, after *3M* and *Leh* announced that the older cases, including its own decision in *Charles Rubenstein, supra,* were no longer controlling precedents. *Hardy Salt Company* v. *State of Illinois,* 377 F. 2d 768, 770 (8th Cir., 1967).

All opinions of the courts of this Country rendered since the *3M* and *Leh* decisions agree that the interpretation of Section 5(b) of the Clayton Act adopted before *3M* and *Leh,* is no longer correct. *State of New Jersey* v. *Morton Salt Co.,* 387 F. 2d 94 (3rd Cir., 1967); *Hardy Salt Company* v. *State of Illinois, supra; State of Vermont* v. *Cayuga Rock Salt Co.,* 276 F. Supp. 970 (D. Me., 1967); *State of Michigan* v. *Morton Salt Company,* 259 F. Supp. 35 (D. Minn., 1966).

2. The policies to be considered in applying Section 5(b) of the Clayton Act do not now require clarification. They were clearly stated in *3M* and *Leh* and since have been construed and applied uniformly in all decisions resolving the problems existing in this case. See *State of New Jersey* v. *Morton Salt Co., supra; Hardy Salt Company* v. *State of Illinois, supra; State of Michigan* v. *Morton Salt Company, supra* and *State of Vermont* v. *Cayuga Rock Salt Company, supra.*

3. The argument of petitioner International that retroactive application of a change in the law to the facts of this case would result in a denial of due process is without merit. That proposition, urged in Point 5 of the Reasons for Granting the Writ set forth in International's petition, has been applied in this field only in cases involving novel judicial statements of substantive antitrust law. *Simpson* v. *Union Oil Co.,* 377 U. S. 13 (1964); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 377

F. 2d 766 (3rd Cir., 1937), cert. granted, 88 S. Ct. 86 (1967); *Lyons* v. *Westinghouse Electric Corp.*, 235 F. Supp. 526, 536-7 (S. D. N. Y., 1964). Its justification is that parties who honestly attempt to determine the existing limits of lawful business conduct and act within such limits should not later be penalized by a retroactive application of a change in the law which they could not foresee. That is not this case. On the contrary, at the time of the modification of a rule, if any, International had already violated the substantive law of this case. Its consent to entry of the decree in the government suit was nothing more than an attempt to avoid further expensive litigation against the United States and to minimize its potential liabilities.

We note also that this argument was presented for the first time in International's Petition for Rehearing before the Court of Appeals. It was not briefed or argued on the appeal itself.

CONCLUSION

For the foregoing reasons, respondents pray that the Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit, Nos. 1345 and 1346, be denied.

Respectfully submitted,

PROSPERO DE BONA,
JAMES A. SCARPONE,
MILTON, KEANE & DE BONA,
Special Counsel for Respondents, State of New Jersey and the County of Bergen.

PINDAR, MCELROY, CONNELL & FOLEY,
Attorneys for Respondent, New Jersey Highway Authority.

JOSEPH R. POSTIZZI,
Attorneys for Respondent, New Jersey Turnpike Authority.

APPENDIX A

Extract from Plaintiff's Brief in Answer to Briefs in Chief of Defendants Morton Salt Company and Diamond Crystal Salt Company, *et al.*, Submitted on Behalf of Plaintiff in *United States of America* v. *Morton Salt Company*

Civil Action 4-61 Civ. 162 (D. Minn.)

ARGUMENT

1. *Defendants Misconceive Plaintiff's Case*

   a. Defendants Misconceive the Scope of Plaintiff's Case

Defendants, to serve their purposes, would redefine the product involved in this case, from "rock salt" to "de-icing rock salt". (D. Br. p. 42) The object would be to subtract from the consideration of this Court any evidence adduced at trial which did not direct itself specifically to de-icing rock salt.

The indictment and complaint in this matter charges a conspiracy "to fix the prices of *rock salt* to be sold to private, state and municipal purchasers." (Emphasis supplied.) Plaintiff had no authority to amend an indictment returned by a grand jury issuing mandates under its authority, and plaintiff has in no way amended or undertaken to amend the complaint in the civil case embodying the same charges as contained in the indictment.

While plaintiff concentrated its proofs at trial on the existence of the conspiracy as it manifested itself in sales of rock-salt for de-icing purposes to government authori-

ties,* it did not exclude, but on the contrary introduced evidence, as did defendants, concerning rock salt generally.

All defendants at trial utilized the processes of explaining bids by previous transactions in rock salt, without specifying whether the salt was to be used for de-icing or whatever the purposes (Tr. 1915; Tr. 2245-46, 2263-65; Tr. 2461; Tr. 3010, 3012-13; Tr. 2952-53). Diamond, in developing its theme in its brief, has no compunctions in discussing conversations with competitors in sales of rock salt to industrial customers (D. Br. p. 38). Defendants apparently would pay it "rock salt for de-icing purposes for plaintiff" and "rock salt without limitation for defendants." To advocate such a double standard in determining the relevancy of proofs, is both fanciful and presumptuous.

The truth of the matter as stated in plaintiff's brief in chief, on the basis of testimony of defendants' own witnesses, is that there is no difference in the price of rock salt based on end use. Moreover the pricing policies followed in selling the salt are the same, no matter who the purchasers are (Pl. Br. p. 5; Tr. 1682, 1683, 3012-3013). In determining whether defendants conspired to fix the prices of rock salt, therefore, there are no fine distinctions to be drawn on the basis of end use and identity of purchaser.

---

* Both the indictment and the complaint charge a nationwide conspiracy. Plaintiff limited its trial proofs of identity of bids to 17 selected geographic areas, as typical of bid patterns throughout the country. This was done in the interest of keeping cumulative evidence within reasonable bounds.

b. Defendants Misconceive Plaintiff's Theory of the Case

Defendants' representations that in the prosecution of its case, "The Government's primary reliance has been on bid identity" (M. Br. pp. 20-22), are patently false. Moreover the representations are puzzling, when four pages later at page 26 of their brief, defendants attribute to counsel for plaintiff the concession that "identity standing alone does not make out a case." Plaintiff, moreover, in its brief in chief stated that it "does not suggest that mere identity of bids conclusively establishes the existence of a conspiracy." (Pl. Br. p. 14)

The fact of the matter is that identity of bids or parallel action is but one element of plaintiff's proofs. Plaintiff, in sustaining the charges, relies much more heavily on defendants' conscious adherence to a policy of "meeting and not beating", to concert of action in observing formula pricing (which plaintiff looks upon not so much as being of "unbending rigidity" [M. Br. p. 57], but as being complicated and difficult of application without collusion), to defendants' telephone calls, and meetings, and incidents of outright bid rigging. Plaintiff's case, then, by no stretch of imagination rests solely on identity of bids or parallel action.

Defendants' efforts to benefit from observations of this Court in *Parsons* v. *Paramount Film Distributing Corp.*, 215 F. Supp. 153 (D. Minn., 1963), are ill founded. In *Parsons* it was sought to draw an inference of conspiracy from *"mere parallel conduct"*. The plus factors over and above parallel conduct in the instant case, take the case completely out of the realm of "mere parallel conduct." *Parsons,* therefore, is not relevant for the proposition cited.

APPENDIX B

Complaint in the United States District Court for the District of Minnesota, Fourth Division

Civil Action
No. 461 Civ. 162

Filed July 11, 1961

UNITED STATES OF AMERICA,

Plaintiff,

v.

MORTON SALT COMPANY, INTERNATIONAL SALT COMPANY, DIAMOND CRYSTAL SALT COMPANY, and CAREY SALT COMPANY,

Defendants.

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the above named defendants and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Act (15 U.S.C., Sec. 4), in order to prevent and restrain the con-

tinuing violation by the defendants, as hereinafter alleged, of Section 1 of the Sherman Act.

2. The defendants transact business and are found within the Fourth Division of the District of Minnesota and within the jurisdiction of this Court.

II

The Defendants

3. Morton Salt Company is hereby made a defendant. It is a corporation organized and existing under the laws of the State of Illinois with its principal place of business at Chicago, Illinois. Said defendant produces and distributes rock salt.

4. International Salt Company is hereby made a defendant. It is a corporation organized and existing under the laws of the State of New Jersey with its principal place of business at Clarks Summit, Pennsylvania. Said defendant produces and distributes rock salt.

5. Diamond Crystal Salt Company is hereby made a defendant. It is a corporation organized and existing under the laws of the State of Michigan with its principal place of business at St. Clair, Michigan. Said defendant produces and distributes rock salt.

6. Carey Salt Company is hereby made a defendant. It is a corporation organized and existing under the laws of the State of Kansas with its principal place of business at Hutchinson, Kansas. Said defendant produces and distributes rock salt.

7. The acts alleged in this complaint to have been done by the defendant corporations were authorized, ordered or done by the officers, agents or employees of said corporations.

Appendix B

III

Co-Conspirators

8. Two corporations engaged in the production and distribution of rock salt, not made defendants herein, participated as so-conspirators with the defendants in the offense hereinafter charged through their officers, agents and employees who performed acts and made statements in furtherance of the said offense. These producer co-conspirators are:

(a) American Salt Company, Olathe, Kansas.

(b) Barton Salt Company, Hutchinson, Kansas.

9. Various other corporations engaged only in the business of distributing rock salt, not made defendants herein, participated in the offense hereinafter charged and performed acts and made statements in furtherance of the said offense. These distributor co-conspirators are:

(a) Cutler-Magner Company, Duluth, Minnesota.

(b) Hardy Salt Company, St. Louis, Missouri.

(c) Cargill, Inc., Minneapolis, Minnesota.

IV

Definitions

10. Whenever any of the following terms shall be used in this complaint it shall have the meaning hereinafter defined:

(a) "Rock salt" means salt in a solid form existing in nature as a layer, bed or formation which is mined and pulverized into fine and coarse grades for many uses including deicing control and water softening.

Appendix B

(b) "Rock salt producer" means a person, firm or corporation engaged in the business of mining and distributing rock salt.

(c) "Rock salt distributor" means a person, firm or corporation engaged in the business of distributing rock salt which it has purchased from a rock salt producer.

(d) "Destination point" means the geographical location of the private, state or municipal purchaser of rock salt.

(e) "F.o.b. mine price" means the price of the rock salt at the mine.

(f) "Delivered price" means the price quoted to the purchaser consisting of the f.o.b. mine price of the rock salt plus transportation charges.

(g) "Deicing control" means the application of rock salt to the surface of roads and highways for purposes of removing snow and ice.

V

NATURE OF TRADE AND COMMERCE

11. The corporations named as defendants herein are the principal rock salt producers, mining and distributing approximately 75 percent of the rock salt sold in the United States. The total sales of rock salt amounted to approximately $25,000,000 for the year 1960.

12. Rock salt is mined in five major areas in the country. These areas are located in the States of Louisiana, Kansas, Michigan, Ohio and New York. Defendants also operate mines, or purchase rock salt from mines located in southern Canada. Rock salt is sold and shipped in

interstate commerce by the defendants and co-conspirators from these areas to other areas of the United States, including the State of Minnesota.

13. State and municipal agencies purchase rock salt, used primarily for deicing control, on a bid basis. A contract is awarded to the low bidder. Bidders are required by states and municipalities to quote delivered prices.

14. Rock salt is also sold and shipped in interstate commerce to most of the states in the United States, including the State of Minnesota, to private purchasers for use, among others, in meat packing and water softening processes and for agricultural processes such as salting livestock.

15. The f.o.b mine prices are published figures and are known throughout the trade. The producers in each area have the same f.o.b. mine prices as their competitors in that area. There are three f.o.b. mine prices for the five producing areas. These are the Kansas price, the Louisiana price, and the Northern price which applies to mines located in the States of Michigan, Ohio, New York and southern Canada. Truck and rail freight rates between the mines and all destination points are published by the Interstate Commerce Commission.

VI

Offense Charged

16. For many years last past, the exact date being to the plaintiff unknown, and continuing to the date of the filing of this complaint, the defendants, co-conspirators and others to the plaintiff unknown, have engaged in an unlawful combination and conspiracy to establish, maintain, stabilize and fix the prices of rock salt, in unrea-

sonable restraint of the hereinbefore described trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", c. 647, 26 Stat. 209, as amended (15 U.S.C., Sec. 1) commonly known as the Sherman Act.

17. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendant, co-conspirators and others to the plaintiff unknown, the substantial terms of which have been and are that they agree:

(a) To fix the prices of rock salt to be sold to private, state, and municipal purchasers;

(b) To quote list prices on rock salt bids to municipal and state authorities;

(c) To adhere to an industry established multiple basing point or zone pricing formula which fixes the delivered prices to each destination point in the United States;

(d) To communicate with each other for the purpose of exchanging information concerning f.o.b. mine prices, transportation charges and other information incidental to fixing delivered prices to be submitted as bids to state and municipal purchasers; and

(e) To notify competing producers in advance of any contemplated change in the f.o.b. mine prices of rock salt.

18. During the period of time covered by this complaint and for the purpose of effectuating the aforesaid combination and conspiracy, the defendants and the co-conspirators, by agreement, understanding, and concert of action, have done the things which, as hereinbefore alleged, they combined and conspired to do.

Appendix B

VII

Effects

19. The aforesaid combination and conspiracy has had the effects, among others, of:

(a) Forcing state, municipal and private purchasers to pay high, arbitrary and non-competitive prices for rock salt produced and sold by the defendants and the co-conspirators; and

(b) Resulting in identical bids for the award of contracts covering the rock salt requirements of state and municipal Governments throughout most of the states in the United States.

Prayer

Wherefore, the plaintiff prays:

1. That the Court adjudge and decree that the defendants have combined and conspired in restraint of the trade and commerce hereinabove described in violation of Section 1 of the Sherman Act.

2. That the defendants, their officers, directors, agents and employees, and all persons acting or claiming to act on behalf of the defendants be perpetually enjoined and restrained from continuing to carry out, directly or indirectly, the combination and conspiracy to restrain the sale and distribution of rock salt as hereinbefore alleged, or any similar combination or conspiracy to restrain the trade and commerce in the sale and distribution of rock salt.

Appendix B

3. That the defendants, their officers, directors, agents and employees, be perpetually enjoined and restrained from establishing, maintaining, stabilizing and fixing the prices or other terms or conditions for the sale of rock salt to private purchasers or state or municipal authorities.

4. That the defendants, their officers, directors, agents and employees, be perpetually enjoined from using a multiple basing point or zone pricing formula to fix the delivered prices of rock salt.

5. That the defendants, their officers, directors, agents and employees, be perpetually enjoined from communicating with each other for the purpose of exchanging information concerning f.o.b. mine prices, transportation charges and other information incidental to fixing rock salt prices submitted as bids to state and municipal purchasers.

6. That the defendants, their officers, directors, agents and employees, be perpetually enjoined from notifying competing producers in advance of any contemplated change in the f.o.b. mine prices of rock salt.

7. That the plaintiff have such other and different relief as the Court may deem necessary and appropriate under the circumstances.

8. That the plaintiff recover the costs of this action.

ROBERT F. KENNEDY
Attorney General

EDWARD R. KENNEY

LEE LOEVINGER
Assistant Attorney General

HERBERT F. PETERS
Attorneys, Department of Justice

MILES W. LORD
United States Attorney

APPENDIX C

Final Judgment in the United States District Court for the District of Minnesota, Fourth Division

Civil Action
No. 4-61 Civ. 162

Filed: March 26, 1962

UNITED STATES OF AMERICA,

Plaintiff,

v.

MORTON SALT COMPANY, INTERNATIONAL SALT COMPANY, DIAMOND CRYSTAL SALT COMPANY, and CAREY SALT COMPANY,

Defendants.

Plaintiff, United States of America, having filed its complaint herein on July 11, 1961, the defendant Carey Salt Company having appeared and filed its answer to the complaint, denying the substantive allegations thereof, and the plaintiff and the defendant Carey Salt Company by their respective attorneys having severally consented to the entry of this Final Judgment without adjudication of any issue of fact or law herein and without this Final Judgment constituting evidence or an admission by either party consenting hereto with respect to any such issue:

NOW, THEREFORE, before any testimony has been taken herein, without trial or adjudication of any issue of law

or fact herein, and upon consent of the parties consenting hereto it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I

This Court has jurisdiction of the subject matter hereof and of the parties consenting hereto, and the complaint states a claim upon which relief may be granted against the defendant Carey Salt Company under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended. The making and entry of this Final Judgment shall be without prejudice to the plaintiff seeking other, further and different relief against the remaining defendants in this action.

II

As used in this Final Judgment:

(A) "Person" means any individual, partnership, firm, association, corporation or other legal or governmental entity;

(B) "Rock salt" means a common salt (sodium chloride) occuring in solid form as a mineral, commonly called halite.

III

The provisions of this Final Judgment applicable to the defendant Carey Salt Company shall apply also to its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendant who shall have received

actual notice of this Final Judgment by personal service or otherwise.

IV

The defendant Carey Salt Company is enjoined and restrained from entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any other person to:

(A) Eliminate or suppress competition in the distribution or sale of rock salt;

(B) Establish, maintain, stabilize or fix prices, pricing methods or any other terms or conditions for sales to any third person;

(C) Exchange information concerning prices, pricing methods, transportation charges or any other terms and conditions of sale at or upon which rock salt will be sold to any third person;

(D) Submit noncompetitive, collusive or rigged bids or quotations to any third person;

(E) Hinder, restrict or limit the right of any purchaser to purchase rock salt from any source; or

(F) Allocate or divide territories, markets or customers.

V

The defendant Carey Salt Company is enjoined and restrained from entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any seller of rock salt to:

Appendix C

(A) Bid or quote, refrain from bidding or quoting or communicate an intention to bid or quote on any rock salt to be sold to any third person; or

(B) Hinder, restrict, limit or prevent any person from selling rock salt to, or purchasing rock salt from, any third person.

VI

The defendant Carey Salt Company is enjoined and restrained from directly or indirectly;

(A) Urging or suggesting to any seller of rock salt the quotation or charging of any price or other term or condition of sale of rock salt;

(B) Communicating to or exchanging with any producer or distributor of rock salt any information relative to prices or transportation charges applicable to rock salt except in connection with bona fide purchase or sale negotiations or offers to sell;

(C) Disclosing to or exchanging with any seller of rock salt the intention to submit or not submit a bid or quotation, the fact that a bid or quotation has or has not been submitted or made, or the content or terms of any bid or quotation;

(D) Selling rock salt to any reseller thereof on a commission basis.

VII

The defendant Carey Salt Company is ordered and directed for a period of three years after the date of entry of this Final Judgment, to submit a sworn statement in the form set forth in the Appendix hereto, with each bid for rock salt submitted to any governmental body, such

sworn statement to be signed by a principal officer of said defendant and by the person actually responsible for the preparation of said bid; and a duplicate of each such sworn statement and of such bid, together with the work papers used in the preparation of such bid shall be kept in the files of the defendant for a period of three years from the date of execution of such bids.

VIII

(A) Nothing in this Final Judgment shall be deemed to prevent the defendant Carey Salt Company from individually or jointly with others presenting its views to appropriate regulatory agencies with respect to transportation charges for rock salt.

(B) The relief which the plaintiff obtains against any of the remaining defendants with respect to pricing methods, including freight equalization and zone-pricing formulae shall be incorporated into this judgment without further proceedings by either party to this Final Judgment.

IX

For the purpose of securing compliance with this Final Judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant Carey Salt Company made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(A) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence,

memoranda and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Final Judgment; and

(B) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the said defendant shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment.

No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law. If any such information is divulged to a duly authorized representative of the Executive Branch, outside the Department of Justice, such information shall be given only after notice to defendant and on the condition that it will not be revealed to any person outside of such representative's Department or Agency except where required by regulation or statute or pursuant to Court process.

Jurisdiction is retained for the purpose of enabling either of the parties consenting to this Final Judgment to

apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

Dated: March 26, 1962

EDWARD J. DEVITT
United States District Judge

We hereby consent to the making and entry of the foregoing Final Judgment:

For the Plaintiff:

_____
Assistant Attorney General

_____
JOHN W. NEVILLE

_____
MARGARET H. BRASS

_____
HERBERT F. PETERS, JR.

_____
WILLIAM D. KILGORE, JR.

_____
JEROME A. HOCHBERG
Attorneys, Department of Justice

Appendix C

For the Defendant Carey Salt Company:

LORING M. STAPLES
FAEGRE & BENSON

WILLIAM B. SWEARER
MARTINDELL, CAREY, HUNTER, DUN & BRABETS

APPENDIX

AFFIDAVIT.

The undersigned hereby certify to their best knowledge and belief that:

(1) The bid to _____ (name of recipient of bid) dated _____ has not been prepared by _____ (name of defendant) in collusion with any other seller of rock salt, and

(2) The prices, terms or conditions of said bid have not been communicated by the undersigned nor by any employee or agent of _____ (name of defendant), to any other seller of rock salt and will not be communicated to any such seller prior to the official opening of said bid,

Appendix C

in violation of the Final Judgment in Civil No. 4-61 Civ. 162 entered by the United States District Court for the District of Minnesota on _____, 1962.

Dated: _____, 1962

_____

Signature of person responsible for the preparation of the bid

_____

Signature of person supervising the above person, where feasible

APPENDIX D

Final Judgment in the United States District Court for the District of Minnesota, Fourth Division

Civil No. 4-61 Civ. 162

UNITED STATES OF AMERICA,

Plaintiff,

—against—

MORTON SALT COMPANY, INTERNATIONAL SALT COMPANY, DIAMOND CRYSTAL SALT COMPANY, and CAREY SALT COMPANY,

Defendants.

Plaintiff, United States of America, having filed its complaint herein on July 11, 1961, the defendant International Salt Company having appeared and filed its answer to the complaint, denying the substantive allegations thereof, and the plaintiff and the defendant International Salt Company by their respective attorneys having severally consented to the entry of this Final Judgment without adjudication of any issue of fact or law herein and without this Final Judgment constituting evidence or an admission by either party consenting hereto with respect to any such issue;

NOW, THEREFORE, before any testimony has been taken herein, without trial or adjudication of any issue of law or fact herein, and upon the aforesaid consent of those parties it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

Appendix D

I

This Court has jurisdiction of the subject matter hereof and of the parties consenting hereto, and the complaint states a claim upon which relief may be granted against the defendant International Salt Company under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended. The making and entry of this Final Judgment shall be without prejudice to the plaintiff seeking other, further and different relief against the remaining defendants in this action.

II

As used in this Final Judgment:

(A) "Person" means any individual, partnership, firm, association, corporation or other legal or governmental entity;

(B) "Rock salt" means a common salt (sodium chloride) occurring in solid form as a mineral.

III

The provisions of this Final Judgment applicable to the defendant International Salt Company shall apply also to its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise, but shall not apply to transactions solely between such defendant and its officers, directors, agents, employees, parent company and subsidiaries, or any of them, when acting in such capacity.

Appendix D

IV

The defendant International Salt Company is enjoined and restrained from entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any other person to:

(A) Establish, maintain, stabilize or fix prices, pricing methods or any other terms or conditions for sales to any third person;

(B) Submit collusive or rigged bids or quotations to any third person.

V

The defendant International Salt Company is enjoined and restrained from entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any seller of rock salt to:

(A) Bid or quote, refrain from bidding or quoting or communicate an intention to bid or quote on any rock salt to be sold to any third person; or

(B) Hinder, restrict, limit or prevent any person from selling rock salt to, or purchasing rock salt from, any third person.

VI

The defendant International Salt Company is enjoined and restrained from directly or indirectly:

Appendix D

(A) Urging or suggesting to any seller of rock salt the quotation or charging of any price or other term or condition of sale of rock salt;

(B) Communicating to or exchanging with any producer or distributor of rock salt any information relative to prices, pricing methods or transportation charges applicable to rock salt except in connection with bona fide purchase or sale negotiations or published offers to sell;

(C) Disclosing to or exchanging with any seller of rock salt the intention to submit or not submit a bid or quotation, the fact that a bid or quotation has or has not been submitted or made, or the content or terms of any bid or quotation; or

(D) Selling rock salt to any reseller thereof on a commission basis.

VII

Nothing in this Final Judgment shall be deemed to (a) prevent the defendant International Salt Company from individually or jointly with others presenting its views to appropriate regulatory agencies with respect to import tariffs or taxes upon or transportation charges for rock salt, or (b) prevent such defendant from exercising any rights it may have under the Act of Congress of 1937, commonly called the Miller-Tydings Act, as amended, or (c) require that such defendant act in violation of any law or regulation of the United States of America.

VIII

For the purpose of securing compliance with this Final Judgment, and for such purpose only, duly authorized

representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant International Salt Company made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(A) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Final Judgment; and

(B) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the said defendant shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment.

No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law.

Appendix D

IX

Jurisdiction is retained for the purpose of enabling either of the parties consenting to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

Dated: November 4th, '63

GUNNAR H. NORDBYE
United States District Judge

APPENDIX E

Amended Final Judgment of the United States District Court for the District of Minnesota, Fourth Division

4-61 Civ. 162

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MORTON SALT COMPANY and DIAMOND CRYSTAL SALT COMPANY,

Defendants.

Plaintiff, United States of America, having filed its complaint herein on July 11, 1961, the defendants Morton Salt Company and Diamond Crystal Salt Company having appeared and filed their respective answers to the complaint, and trial of this cause having been held in accordance with the stipulation assented to by attorneys for said parties signed by the Court and filed on November 4, 1963, and the Court having on August 6, 1964, issued a Memorandum Decision directing the submission of a decree in accordance therewith and the Court having filed its Findings of Fact and Conclusions of Law on November 24, 1964, and the Court having filed its order amending the Final Judgment on February 19, 1965,

NOW, THEREFORE, it is hereby

ORDERED, ADJUDGED and DECREED as follows:

Appendix E

I

This Court has jurisdiction of the subject matter hereof and of said parties hereto. The complaint states a claim upon which relief may be granted against the defendants Morton Salt Company and Diamond Crystal Salt Company under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended, and defendants Morton Salt Company and Diamond Crystal Salt Company have combined and conspired to fix prices of rock salt in restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act.

II

As used in this Amended Final Judgment:

(A) "Person" means any individual, partnership, firm, association, corporation, or legal or governmental entity;

(B) "Rock salt" means a common salt (sodium chloride) occurring in solid form as a mineral.

III

The provisions of this Amended Final Judgment applicable to the defendants Morton Salt Company and Diamond Crystal Salt Company shall also apply to their respective subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendants who shall have received actual notice of this Amended Final Judgment by personal service or otherwise, but shall not

apply to transactions solely between a defendant and its officers, directors, agents, employees, parent company and subsidiaries, or any of them, when acting in such capacity.

IV

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any other person to:

(A) Establish, maintain, stabilize or fix prices, pricing methods or any other terms or conditions for any sale to any third person;

(B) Submit collusive or rigged bids or quotations to any third person.

V

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any seller of rock salt to:

(A) Bid or quote, refrain from bidding or quoting or communicate an intention to bid or quote on any rock salt to be sold to any third person; or

(B) Hinder, restrict, limit or prevent any person from selling rock salt to, or purchasing rock salt from, any third person.

Appendix E

VI

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from directly or indirectly:

(A) Urging or suggesting to any seller of rock salt the quotation or charging of any price or other term or condition of sale for rock salt;

(B) Communicating to or exchanging with any person any information relative to prices, pricing methods or transportation charges applicable to rock salt, except with

(1) prospective purchasers in connection with bona fide purchases or sale negotiations or published offers to sell;

(2) carriers in connection with bona fide shipments; and

(3) warehousemen in connection with bona fide storage arrangement.

(C) Disclosing to or exchanging with any seller of rock salt the intention to submit or not submit a bid or quotation, the fact that a bid or quotation has or has not been submitted or made, or the content or terms of any bid or quotation.

(D) Selling rock salt to any reseller thereof on a commission basis.

VII

The defendants Morton Salt Company and Diamond Crystal Salt Company are each directed and ordered for a period of three years after the date of the entry of

this Amended Final Judgment to prepare monthly a sworn statement in the form set forth in the Appendix hereto attached in which it shall list each bid for rock salt submitted by it to a governmental body during the next preceding calendar month. These sworn statements are to be submitted to the Department of Justice of the United States by such defendant on or before the last date of each calendar month during the three-year period commencing March 31, 1965. A duplicate of the sworn statement as to the bids listed thereon, together with the work papers used in the preparation of such bid shall be kept in the files of the defendant for a period of three years from the date of the execution of such bids.

VIII

Nothing in this Amended Final Judgment shall be deemed to (a) prevent the defendants Morton Salt Company and Diamond Crystal Salt Company from individually or jointly with others presenting their views to appropriate regulatory agencies with respect to import tariffs or taxes upon or transportation charges for rock salt, or (b) prevent such defendants from exercising any rights they may have under the Act of Congress of 1937, commonly called the Miller-Tydings Act, as amended, or (c) require that such defendants act in violation of any law or regulation of the United States of America, or (d) prevent such defendants, or any of their respective subsidiaries, successors, assigns, officers, directors, agents, or employees, from participating in any *bona fide* distributorship or brokerage dealings or transactions not illegal under any of the antitrust laws of the United States.

Appendix E

IX

For the purpose of securing compliance with this Amended Final Judgment duly authorized representatives at the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant Morton Salt Company or defendant Diamond Crystal Salt Company made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(A) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Amended Final Judgment; and

(B) Subject to the reasonable convenience of said defendant and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the said defendants shall submit such written reports with respect to any of the matters contained in this Amended Final Judgment as from time to time may be necessary for the purpose of enforcement of this Amended Final Judgment.

X

No information obtained by the means permitted in this Section shall be divulged by any representative of the De-

partment of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this Amended Final Judgment in which the United States is a party or as otherwise required by law.

XI

Jurisdiction is retained for the purpose of enabling any of the parties to this Amended Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Amended Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

XII

The defendants Morton Salt Company and Diamond Crystal Salt Company are hereby ordered to pay all costs to be taxed in this case.

Exceptions to this judgment are reserved.

Dated this 19th day of February, 1965.

By the Court:

Gunnar H. Nordbye
Judge

Appendix E

APPENDIX

Affidavit

The undersigned, a principal officer of _____ (name of defendant), being first duly sworn, certifies to his best knowledge and belief that:

(1) Listed herein under Paragraph (2) hereof are all of the bids for the sale of rock salt submitted by _____ (name of defendant) to any governmental body during _____ (month and year) and that none of the bids listed were prepared by _____ (name of defendant) in collusion with any other seller of rock salt.

(2) List of bids, the name of recipient, and the date submitted during _____ (month and year):

_____

_____

_____

(3) The prices, terms or conditions of said bids were not submitted or made known by _____ (name of defendant) or by any employee or agent of _____ (name of defendant) to any other seller of rock salt prior to the official opening of said bids in violation of the Final Judgment in Court Action No. 4-61 Civil 162 entered by the United States District Court for the District of Minnesota, as amended on February 19, 1965.

_____

(Name of defendant)

By _____

Subscribed and sworn to before me this_____ day of _____, 196—.

_____

Notary Public
(State and County)

APPENDIX F

Memorandum Decision of the United States District Court for the District of Minnesota, Fourth Division

4-61 Civ. 162

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MORTON SALT COMPANY and DIAMOND CRYSTAL SALT COMPANY,

Defendants.

This cause comes before the Court on a stipulation filed November 4, 1963, whereby the issues herein are submitted on the record in a criminal proceeding between the same parties.

Mr. John W. Neville, Mr. Jerome A. Hochberg, and Mr. Robert J. Rotatori, Attorneys, Department of Justice, Washington, D. C., appeared in behalf of the plaintiff;

and

Mr. L. M. McBride and Mr. John P. Ryan, Jr., Chicago, Illinois (Messrs. McBride, Baker, Wienke & Schlosser, Chicago, Illinois, and Mr. John G. Robertson and Messrs. Oppenheimer, Hodgson, Brown, Wolff & Leach, St. Paul, Minnesota, of counsel) in behalf of defendant Morton Salt Com-

pany; Messrs. Bowen, Bowen, Preus, Farrell & Adams, Minneapolis, Minnesota, and Messrs. Dickinson, Wright, McKean & Cudlip, Detroit, Michigan, in behalf of defendant Diamond Crystal Salt Company.

Defendants are charged with violation of Section 1 of the Sherman Act, 15 U.S.C. Section 1, the pertinent portion of which reads:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restrain of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *."

The complaint alleges a conspiracy to fix the prices of rock salt. The issues herein are limited to sales to public authorities under sealed bids. The defendants in this civil proceeding are Morton Salt Company and Diamond Crystal Salt Company. Originally, Carey Salt Company and International Salt Company were parties, but consent decrees have been entered as to them. The co-conspirators not named as parties herein with which the evidence is concerned primarily are Cutler-Magner Company, of Duluth, Minnesota, a distributor for Morton Salt Company, and Cargill Corporation, of Minneapolis, Minnesota, a distributor for Diamond Crystal Salt Company. The governmental agencies concerned are located in the States of Minnesota, Wisconsin, Michigan, Illinois, Ohio and Indiana. In these areas, the parties share some 85 to 95 per cent of the rock salt business. The annual sales to governmental agencies are admittedly substantial.

It is the plaintiff's contention that the record herein amply substantiates a finding that, during the period from

1956 to 1960, these defendants, with others involved acting in concert, adopted a policy of restrictive pricing of rock salt to the end that separate bidding on this commodity to be furnished to the various governmental agencies in the area involved should produce identical prices. This plan, according to the plaintiff, was carried out primarily by a so-called formula price fixing; that is, the defendants maintained arbitrary f.o.b. mine prices which bore no relation to their costs of production, overhead, or anticipated profits; that a method or plan was devised by the conspirators whereby each of the defendants, according to a pre-arranged plan or understanding in preparing bids to a particular governmental agency, would first determine in order to meet the competitive price of the other competitors, the latter's f.o.b. prices. The f.o.b. prices were maintained, according to the plaintiff, at a high enough level to protect the pricing policy of the defendant suppliers, and directed to constitute a means whereby each of the rock salt suppliers in the industry would be better enabled to meet the bidding price of any particular supplier. In addition, plaintiff contends that a defendant bidder would in most instances include the rail freight rates of its competitor or competitors even though the shipment was to be made by water or by truck, knowing that to be the method which would be employed by its competitors in determining their bidding prices. In other words, plaintiff contends that if A is to bid against B, A will attempt to frame its bid on B's f.o.b. mine price and freight rates, whether artificial or not, in attempting to compute a competitor's delivered price, and with the designed purpose of meeting, that is, to match, and not beat, the bidding price of its competitor or competitors. Plaintiff recognizes that,

in addition, there is a practice among the defendants to obtain post-bidding information of their competitors. These practices, however, according to plaintiff, are all designed to carry out an understanding as to uniform bid prices among the suppliers of rock salt even though their purpose and intent may not always be attained. In other words, plaintiff contends that there was a concerted plan among the defendants to meet the price of all competition in all bidding so far as that plan could be accomplished. Plaintiff contends that its position as to the plan and practice followed by the industry in this regard is not only directly sustained by the evidence, including the meetings of the parties with each other to achieve this end, but that the record reflects what it terms a monotonous identity of the bids among the defendants. For instance, plaintiff points out that to the State of Minnesota in 1956, Morton, Cutler-Magner and International bid identically on some 67 locations. In 1957, to this State, the same bidders were identical in 57 locations. In 1958, to Minnesota, Cutler-Magner, International and Cargill were identical at 68 out of 69 delivered locations, and on a re-bid they were identical 53 times. In 1959, Cutler-Magner, International and Cargill participated in four separate invitations to bid to Minnesota, and on some 273 occasions the bids were from 95 to 100 per cent identical. In 1960, to the same State, Cutler-Magner, International and Cargill were identical on 135 different bids involving truck and railroad bag deliveries, and on some 41 bids during that year, Cutler-Magner and Cargill were identical 90 per cent of the time. And to the City of Minneapolis during a period from 1957 to 1960, the Morton or Cutler-Magner or Cargill bids with International 47 times on bulk truck, bulk pick-up, bag truck or bag pick-up bids were identical. Diamond, how-

ever, submitted no bids to Minnesota municipalities during the period in question.

The record of Morton and International with Cutler or Cargill in bids to the State of Wisconsin in 1956, 1957, 1958 and 1959 reflects a percentage of identical bidding which varies from 94 to 100 per cent. In bids to the City of Milwaukee, Wisconsin, Morton and International were identical from 1956 to 1960. A similar record as to Morton and International were reflected in bidding to the City of Detroit, Michigan, the State of Ohio and the State of Ohio Turnpike Commission. Diamond, however, in 1958 as to Wisconsin area destinations was non-identical in 41 out of 62 bids, and in 1959 there was non-identical in 41 out of 62 bids, and in 1959 there was non-identity in 52 out of 72 of its Wisconsin bids, and on re-bid for that year Diamon was completely non-identical. In 1960 Diamond's bid to the State of Wisconsin was 94.4 per cent identical in 67 out of 71 bids, and 100 per cent identical in four bids with Morton and International to the City of Milwaukee. However, in 1960, as to Wayne County Road Commission of Michigan, Diamond was 100 per cent in identity as a bidder in some 17 bids with Morton and International. As to Illinois bidding in the year 1957, Diamond, International and Cargill out of 11 bids, were identical in 165, or 91.2 per cent, and in 1959, in bag railroad and bulk railroad, Morton, Diamond and International in some 45 bids were 100 per cent identical, and in 1960, 90 per cent identical. These Illinois bids were made to the State of Illinois Highway Division. In bids to the State of Illinois Toll Road Commission, Diaimond, Morton, International and Cargill were 100 per cent identical in the year 1960 in some 16 bids. In Ohio in the years 1958 to 1960 Diamond's record as to

identity of bids carried from 94.3 to 100 per cent in identity.*

The position of the defendants may be summarized as follows: Rock salt is a homogenous substance which for the purpose of de-icing is of the same quality regardless of the producer. It is bought strictly on the basis of price. According to the defendants, business experience has fully established the necessity of attempting to have uniformity in bids made to governmental agencies. Uniformity in bidding is therefore attempted to be attained by an examination of prior bids of competitors and an independent analysis is made by each of the defendants in framing bids in an attempt to meet the bids of competitors so as to avoid the debacle in the rock salt market if price cutting were entered upon. Thus, it is argued that, although there is an individual attempt to attain uniformity in the bids made to the various governmental agencies, this attempted result is not due to any concert of action or understanding among the defendants but represents the individual exercise of common business prudence. According to the defendants, the identity of bids which the Government stresses as evidence of conspiracy to fix prices is due to four principal factors: (1) The factor growing into the make-up of most bids, i.e., the f.o.b. mine price and the common knowledge of freight rates; (2) prior bids of competitors to any governmental agencies in any State are made known and made use of in framing the next year's bids by competitive bidders; (3) additional competitive information is attained

* The above recited statistical data as to the results of bidding do not assume to include a summary of the entire record with respect thereto, but it is fairly representative and the percentages quoted are substantially correct.

by each of the defendants obtaining public data disclosed at the opening of bids; and (4) the number of major companies producing rock sale is sufficiently small so that the bidding practices may be analyzed and followed by the others. Thus, it is urged by the defendants that the Government's attempt to deduce collaboration from mere identity of bids is completely frustrated by the record herein. It is the position of the defendants that the identity of bids stems from the attempt to adopt and match bids of competitors with the defendants acting individually in the best interests of their companies. Each of the defendants points out that the mere individual following of a competitor's announced price is not illegal even if it is carried out with the intent of achieving identical prices. Self-interest, it is argued, dominates the interest of each defendant in its individual attempt to match a competitive price and not a conspiracy or understanding among the defendants, as the Government charges. In addition, the defendants argue that the express denials of collusion by the officials of the defendants fully negatives the assumption which the Government assumes to deduce from parallelism in prices. And the defendants vigorously emphasize the evidence of aggressive competition among the defendants, at least at certain periods during the existence of the alleged conspiracy.

At the outset, it must be recognized that identical bids do not necessarily indicate that they emanate from collusion or conspiracy on the part of the defendants to fix prices. Moreover, ruinous competition among the producers of rock salt may well spell disaster to the entire industry. On the other hand, if there is a conspiracy to fix prices in violation of the law, defendants may not justify their action by the contention or defense that they were motivated to enter into it in order to avoid ruinous com-

petition. It is difficult to analyze this entire record as to collaboration among the parties and with the multitude of complete identities in the bids to the very penny without concluding that this anomalous result was obtained in no other manner than by an adherence to a plan adopted by consultation and conferences among the parties involved. That the plan did not at all times prove effective and that there were sporadic departures therefrom is readily apparent. But equally so are the incidents as to conferences in meetings, by telephone, and otherwise, which were carried on by the parties in order to restore the understanding among the parties.

In finding that the plaintiff has established by a fair preponderance of the evidence that there was an agreement among these defendants to meet the bid prices of the various rock salt bidders who filed written bids with governmental agencies during the period in question and in the geographical area referred to, the Court is entirely mindful that at times when it seemed to suit their purpose, these companies have taken independent action by way of bid prices. Moreover, Morton Salt Company obtained a controlling interest in certain Canadian companies in order to compete with International, which resulted in a marked increase in the business of Morton and to the detriment of the business of International. There is evidence that during the period covered by the complaint, not only was Diamond merely partly successful in meeting bid prices of its competitors, but that it adopted new techniques in the distribution of rock salt whereby Diamond and its distributor, Cargill, markedly increased their sales to the dimunition of sales by some of the other defendant competitors. Admittedly, these circumstances may seem inconsistent with the position of the Government with ref-

erence to the alleged understanding to avoid competition in the bid prices of rock salt. But, on the other hand, it is not the position of the plaintiff that the understanding and plans of the parties at all times operated with complete efficiency. The defendants agree that they did attempt *individually* to meet the bid price of other competitors in order to avoid a spiral of prices downward which allegedly would have been ruinous to the industry. The fact that there were, during the period in question, instances of aggressive competition and strategy in attempting to build up the individual business position by one or more of the defendants does not negative the affirmative evidence that during the period in question there was in effect among the defendants a concerted plan and effort founded upon an understanding and agreement among the parties that there should be, and was, as far as possible, a fixing of uniform prices in the bidding prices for rock salt to the governmental agencies in the areas involved. Price fixing practices by a concert of action which are condemned by the law are not freed from the law's impact merely because the plan at times broke down by the competitive acts of the so-called mavericks in the industry, or that there was not uniformity at all times in the carrying out of the plan. Moreover, even legitimate sources of information as to previous bids or computation of bids to meet a competitor's bid which are made on factors well known to all in the industry, if gathered and obtained in pursuance of a plan and understanding between and among the parties that the prices of rock salt should be uniform, may be considered as activities in furtherance of an illegal conspiracy.

In making the foregoing observations, this Court has fully recognized the principle that defendants emphasize,

to with, that an agreement is a *sine qua non* of a price conspiracy and that the language of the Supreme Court in *Theatre Enterprises* v. *Paramount Film Dist. Corp.*, 346 U. S. 537 (1954), at pp. 540-41, is particularly pertinent here:

> "* * * To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. * * * But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."

However, we do not only have circumstantial evidence of consciously parallel behavior, but sufficient additional facts and circumstances which amply justify the Court in concluding that by the greater weight of all the evidence the plaintiff has sustained the burden of proof which the law imposes upon it.

Plaintiff may, on September 14, 1964, at ten o'clock A.M., upon appropriate notice, present proposed findings of fact and conclusions of law and order for judgment consistent herewith. Exceptions will be reserved to the defendants.

Dated this 6th day of August, 1964.

By the Court:

GUNNAR H. NORDBYE
Judge

APPENDIX G

Findings of Fact and Conclusions of Law of the United States District Court for the District of Minnesota, Fourth Division

4-61 Civ. 162

(Filed—November 24, 1964.)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MORTON SALT COMPANY and DIAMOND CRYSTAL SALT COMPANY,

Defendants.

The complaint in this case, which was filed on July 11, 1961, alleges a conspiracy to fix the prices of rock salt. Except for the prayer for relief and other appropriate charges in form therein, the complaint is identical to an indictment filed June 28, 1961, in Criminal Action No. 4-61 Cr. 65, against Morton Salt Company ("Morton"), International Salt Company ("International"), Diamond Crystal Salt Company ("Diamond"), and Carey Salt Company ("Carey"). Prior to the trial of said criminal action, Carey pleaded *nolo contendere* and concurrently therewith a consent judgment was entered against Carey in this civil case. On June 7, 1962, after a trial which commenced on May 2, 1962, Morton, International and Diamond were acquitted of the charge set forth in the indictment by the jury impaneled in said criminal action. On November 4,

1963, a consent judgment was entered against International in this case. Pursuant to a "Stipulation Re Trial of Case on Record," filed November 4, 1963, plaintiff, Morton and Diamond agreed that this case be tried on the record made in said criminal action, as supplemented by plaintiff's interrogatories 1 and 2 filed in this case, Morton's answers thereto, and Diamond's answers thereto, as amended. The initial briefs of the plaintiff and of each defendant were concurrently filed on or about December 2, 1963, and their responsive briefs were concurrently filed on or about December 23, 1963. This Court's Memorandum Decision was filed on August 6, 1964.

Mr. John W. Neville and Mr. Jerome A. Hochberg, Attorneys, Department of Justice, Washington, D. C., appeared in behalf of the plaintiff;

Mr. L. M. McBride and Mr. John P. Ryan, Jr., of Messrs. McBride, Baker, Wienke & Schlosser, Chicago, Illinois, and Mr. John G. Robertson, of Messrs. Oppenheimer, Hodgson, Brown, Wolff & Leach, St. Paul, Minnesota, in behalf of defendant Morton Salt Company;

Mr. Fred W. Freeman and Mr. George B. Martin, of Messrs. Dickinson, Wright, McKean, & Cudlip, Detroit, Michigan, and Mr. Robert E. Bowen, of Messrs. Bowen, Bowen, Preus & Farrell, Minneapolis, Minnesota, in behalf of defendant Diamond Crystal Salt Company.

Findings of Fact

I

The following Findings of Facts are limited to sales of de-icing rock salt by Morton from 1956 to 1960, by Dia-

mond from 1957 to 1960, and by other co-conspirators during that period, made under sealed bids submitted to one or more of the following government agencies: State of Minnesota, City of Minneapolis, City of St. Paul, State of Wisconsin, City of Milwaukee, State of Illinois, Illinois Toll Road, City of Chicago, Chicago Transit Authority, State of Indiana, Indiana Toll Road, State of Michigan, Wayne County, City of Detroit, State of Ohio and Ohio Turnpike.

II

Rock salt is the term applied to solid sodium chloride and its impurities as it is found in nature. It is mined in five principal sections of the United States, namely Louisiana, Kansas, Michigan, Ohio and New York. Defendants ship rock salt in interstate commerce.

The location of the mines which were the principal sources of rock salt sold to government agencies in the Six-State Midwest Area during all or part of the years 1956-60 are as follows:

Detroit, Michigan—International

Ojibway, Ontario, Canada—Morton

Fairport, Ohio—Morton

Jefferson Island, Louisiana—Diamond

Goderich, Ontario, Canada—Sifto Salt Limited, from which Diamond purchased rock salt for resale in the United States during 1960

Hutchinson, Kansas—Carey

Kanapolis, Kansas—Independent Salt Company

Lyons, Kansas—American Salt Company

Appendix G

Until January, 1957, Diamond did not produce rock salt and did not sell rock salt to government agencies. At that time it acquired Jefferson Island Salt Company whose only rock salt mine is located at Jefferson Island, Louisiana.

III

International, Morton and Diamond among them share 85-90% of the rock salt market nationwide. This degree of control is present specifically in the Six-State Midwest Area, i.e., Minnesota, Wisconsin, Michigan, Illinois, Ohio, and Indiana, the subject of concentrated proof at trial.

IV

Defendants, with co-conspirators, in concert, adopted a policy of restrictive pricing of rock salt to the end that bidding on this commodity to be furnished to the various governmental agencies with which the conspirators did business should produce identical prices. The policy, in application, consisted simply and avowedly of not competing on prices, or otherwise stated, "meeting but not beating the price of a competitor."

V

The policy was carried out in the main by a system of formula pricing consciously adhered to by the conspirators, relying primarily on the following:

(a) The conspirators, by concert of action, would use the same f.o.b. mine prices in computing delivered prices.

(b) The f.o.b. mine prices so used bore no relation to the conspirators' costs of production, overhead, or anticipated profits, but were maintained at a high enough level to protect the pricing policy and better enable the conspirators to meet one another's prices.

Appendix G

(c) The conspirators, by concert of action, would use artificial freight rates in computing delivered prices.

VI

Concert of action among the conspirators was achieved by the conspirators maintaining among themselves a system of intelligence, the specific purpose of which was to assure adherence to formula and arrive at identical prices to public authorities.

VII

The system of intelligence was maintained by telephone calls and by meetings held periodically among the conspirators. The calls and meetings were among officers of the conspirators at the higher echelons. Meetings took place in Minnesota, Illinois, Michigan and elsewhere.

VIII

The effect of the conspiracy on public authorities was to cause bids to said public authorities for de-icing salt, including the sixteen mentioned specifically in the Government's proofs as indicative of bids made by the conspirators to public authorities generally, to be identical to a substantial and in many instances to an extraordinary degree, thereby depriving said public authorities of the advantage of competitive bidding.

IX

Plaintiff has sustained its burden of proof not only by evidence of consciously parallel behavior but also by abundant positive evidence of outright collaboration establishing the existence of agreement and understanding among the parties.

Appendix G

X

The fact that there were instances of aggressive competition and strategy in attempting to build up the individual business position by one or more of the defendants, or the fact that there were breakdowns or interruptions in the uniformity of price patterns caused by so-called "mavericks" or otherwise, does not negative the preponderantly affirmative evidence established by the record as a whole that there was in effect among the conspirators a concerted and continuing plan and effort founded upon an understanding and agreement among the parties that there should be, and was, as far as possible, a fixing of uniform prices in the bidding prices for rock salt to the government agencies with which the conspirators did business.

Upon the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

1. The defendants are and have been engaged in trade and commerce among the several States in the sale of rock salt. The Court has jurisdiction of the parties and the cause of action herein.

2. The defendants Morton Salt Company and the Diamond Crystal Salt Company have combined and conspired to fix prices in the sale of rock salt in violation of Section 1 of the Sherman Act as charged in the complaint.

3. A final judgment consistent herewith will be entered.

Exceptions are reserved.

Dated this 24th day of November, 1964.

BY THE COURT:

GUNNAR H. NORBYE
Judge.

REME COURT, U. S.

FILED
MAY 29 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967.

No. 1345.

INTERNATIONAL SALT COMPANY,
Petitioner,

v.

THE STATE OF NEW JERSEY, on Behalf of Itself and All Others Similarly Situated, et al.,
Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION.

LEWIS H. VAN DUSEN, JR.,
DRINKER BIDDLE & REATH,
1100 Philadelphia National Bank Bldg.,
Philadelphia, Pa. 19107
Counsel for Petitioner,
International Salt Company.

HOWARD F. ORDMAN,
MORRIS R. BROOKE,
Of Counsel.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1345.

INTERNATIONAL SALT COMPANY,
Petitioner,

v.

THE STATE OF NEW JERSEY, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,
Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION.

As has been pointed out in our petition (pp. 13-15) the result reached by the Court of Appeals herein was arrived at by the retroactive application of a "change" in the law contained in section 5(b) of the Clayton Act so as to revive petitioner's expired liability. Respondents in their Brief in Opposition to seek to sustain this result by the following statement:

> "[The] justification [for the rule against retroactive application] is that parties who honestly attempt to determine the existing limits of lawful business conduct and act within such limits should not later be penalized by a retroactive application of a change in the law which they could not foresee. That is not this case. On the contrary, at the time of the modification

> of a rule, if any, International had already violated the substantive law of this case. Its consent to entry of the decree in the government suit was nothing more than an attempt to avoid further expensive litigation against the United States and to minimize its potential liabilities." (Respondents' Brief in Opposition, p. 7)

The argument that the ordinary principle of law applicable here may appropriately be ignored in petitioner's case because it ". . . had already violated the substantive law of this case . . ." is a gross distortion of the record. Petitioner was *acquitted* by a jury after a five-week trial in the government criminal action in Minnesota.[1] The companion government civil action upon which respondents rely to press their claims was tried upon the record compiled in the criminal case, a record on the basis of which petitioner's *innocence* had already been established. It was at this stage that petitioner entered a consent decree hoping and expecting to put an end to further litigation. The importance of protecting petitioner's interest, as well as the government's interest in promoting consent decrees by not disturbing later the expectations of consent decree entrants, has been stressed in our petition (pp. 12-13). See also the Report on the Consent Decree Program of the Department of Justice, pages 7-10; *United States v. Western Electric Co., Inc.* (No. 17-49, D. N. J., 1968) (petition for certiorari filed, No. 1404, October Term, 1967); and the discussion in 81 Harv. L. Rev. 356, 400-407. No justification for specially penalizing petitioner and applying a "change" in the law retroactively to revive its liability can be found in respondents' erroneous statement that petitioner "had already violated the substantive law of the case." The result reached by the Court of Appeals in this case was

1. See petition, p. 5.

based simply upon a determination not to apply the principles declared in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 377 F. 2d 776 (3 Cir. 1967), cert. granted, 88 S. Ct. 86 (1967); *Simpson v. Union Oil Co.*, 270 F. Supp. 754 (N. D. Cal. 1967); and *Lyons v. Westinghouse Electric Corp.*, 235 F. Supp. 526, 536-7 (S. D. N. Y. 1964) to this case. We think that determination was erroneous, and that for this reason, as well as for the other reasons set forth in our petition, the Court should review this case.

Respectfully submitted,

LEWIS H. VAN DUSEN, JR.,
DRINKER BIDDLE & REATH,
1100 Phila. Nat'l Bank Building,
Philadelphia, Pa. 19107
Attorneys for Petitioner,
International Salt Company.

HOWARD F. ORDMAN,
MORRIS R. BROOKE,
Of Counsel.